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No. 1250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL FOODS CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
I. The Issue of Substitute Products	
A. The Facts	6
B. The Opinions Below	9
II. The Issue of Entry Barriers	
A. The Facts	12
B. The Opinions Below	12
III. The Issue of Operating Efficiencies	
A. The Facts	14
B. The Opinions Below	15
Reasons for Granting the Writ	16
I. On the Important Legal and Economic Question of the Relevance of Potential Competition From Close Substitute Products, the Rule Announced Below Conflicts With Prior Holdings of This Court and With Accepted Economic Doctrine	18
II. The Reliance of the Court Below on a Novel Abstract Rule—That Entry Barriers May Be Analyzed Without Regard to the Character of Identified Potential Entrants—Is Inconsistent With Accepted Economic Principles and With the Decisions of This Court	22
III. The Lower Tribunals' Reliance Upon Achievement of Operating Efficiencies as an Affirmative Ground for Prohibiting a Conglomerate Merger Is a Radical Departure From the Accepted Goals of Antitrust Policy	26
Conclusion	30
Appendix A—Opinion and Judgment of the Court of Appeals	
Appendix B—Opinion and Order of the Federal Trade Commission	
Appendix C—Petitioner's Motion and Supporting Affidavit in the Court of Appeals	

CITATIONS

Cases: Page

Burlington Truck Lines Inc. v. *United States*, 371 U.S. 156 (1962) 23
Consolidated Foods Corp. v. *FTC*, 380 U.S. 592 (1965) 23
Federal Trade Commission v. *Procter & Gamble Co.*, 63 F.T.C. —, [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673 (FTC 1963), *rev'd*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967) 4-6, 10, 16, 18, 21, 23-25, 27, 29
NLRB v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965) 23
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 23
United States v. *Continental Can Co.*, 378 U.S. 441 (1964) 20, 21
United States v. *El Paso Gas Co.*, 376 U.S. 651 (1964) 18, 21, 23, 25
United States v. *Penn-Olin Co.*, 378 U.S. 158 (1964) 18, 20, 21, 23, 24, 25

Statutes:

Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. § 12 *et seq.*:
Section 7 ..... 3, 4, 10
Section 11 ..... 2, 6
Judicial Code, 28 U.S.C. § 1254 (1964) 2

Miscellaneous:

BAIN, BARRIERS TO NEW COMPETITION (1956) 19, 25, 26
BAIN, INDUSTRIAL ORGANIZATION (1959) 17, 19
BOOK, MERGERS AND MARKETS (6th ed. 1968) 16, 22, 29
BRIEF FOR THE FEDERAL TRADE COMMISSION, *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) 27
COUNCIL OF ECONOMIC ADVISORS ANNUAL REPORT, in ECONOMIC REPORT OF THE PRESIDENT (1965) 20
Elman, *Clorox and Conglomerate Mergers*, 36 ANTITRUST L.J. 23 (1968) 27, 29
Hale & Hale, *More on Mergers*, 5 J. LAW & ECON. 119 (1962) 16
Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, pursuant to S. Res. 40, 89th Cong., 1st Sess., pt. 2 (1965) 17
KAYSEN & TURNER, ANTITRUST POLICY (1959) 17, 26
PENROSE, THE THEORY OF THE GROWTH OF THE FIRM (1959) 16
REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) 20
Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965) 15, 16, 17, 26, 27, 28, 29

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Petitioner prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 21, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 386 F.2d 936 (1967) and appears at Appendix A to this petition. The final order and opinion of the Federal Trade Commission (Dkt. 8600) is reported at — F.T.C. —, [1965-67 Transfer Binder] TRADE REG. REP.

¶ 17,465 (FTC 1966), appears at Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1967, and appears at Appendix A to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964) and Section 11(c) of the Clayton Act, as amended, 15 U.S.C. § 21(c) (1964).

QUESTIONS PRESENTED

1. Where a relevant "product submarket" has been selected in a conglomerate merger case, may the economic effect upon that submarket of close substitute products being developed and marketed by numerous aggressive and well-financed rivals be treated as legally irrelevant in determining whether the merger may substantially lessen competition within the submarket?

2. Where the record in a conglomerate merger case shows the existence of numerous identified potential competitors of great size and strength in close economic proximity to the relevant submarket, may a reviewing court of appeals properly conclude that the merger is illegal on the basis of an abstract conclusion (different from that of the Federal Trade Commission below) that the merger raised entry barriers, without any determination whether, in light of the character of the potential competitors, their competitive influence upon the relevant submarket was lessened or whether they might actually be deterred from entry?

3. Is an increase in efficiency in the operations of an acquired firm as a result of a conglomerate merger an affirmative reason for invalidating the merger under the antitrust laws?

STATUTE INVOLVED

Section 7 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914), provides in pertinent part as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT

In this conglomerate merger case the acquired company was the S.O.S. Company, a closely-held corporation which since 1919 had been engaged in the manufacture of scouring devices for the housewife's use in the kitchen. (R. 979a.[1]) Its principal product was the "S.O.S." soap pad, a soap-impregnated steel wool pad used primarily for cleaning pots and pans. (R. 521-22a, 1480a.)

In the 1950's the principal S.O.S. shareholder "was getting along in years" and wanted to sell the business and retire. (R. 411a.) He approached petitioner, General Foods Corporation ("GF"), with a view to a sale of the S.O.S. business. (R. 1010a.) GF, a large

[1] The Record in this Court includes the printed joint appendix in the Court of Appeals. "R." citations are to pages of this joint appendix. GF exhibits are designated "RX" and FTC exhibits "CX." For convenience, the pagination of the Commission opinion as it appears in the printed Record has been retained in Appendix B to this Petition.

manufacturer of packaged food products, had never manufactured or sold products in any way comparable or related to those of S.O.S. (R. 52a, 1401a), and was not an actual or potential competitor or an actual or potential supplier or customer of S.O.S. (App. A, p. 20; App. B, p. 234a; R. 6a, 15a, 163a, 367a, 410a, 411a). On December 31, 1957, GF purchased all of the assets of the S.O.S. Company. (R. 3a, 14a.) Some six years later the Federal Trade Commission issued a complaint alleging that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. § 18. (R. 1a.)

On March 17, 1966, by a vote of three to two, the Commission held that this conglomerate merger violated Section 7 and ordered divestiture. (App. B, pp. 189a-90a.) The Commission's majority opinion, written by Commissioner Mary Jones, concluded that the merger was "identical in all respects" (App. B, p. 212a) to that found unlawful in *Federal Trade Commission* v. *Procter & Gamble Co.*, 63 F.T.C. —, [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673 (FTC 1963), *rev'd*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967) (hereinafter the "*Clorox*" case).

The dissenting opinion was written by Commissioner Elman, the author of the Commission's opinion in *Clorox*. He concluded that the present case was markedly different from *Clorox* in several respects:

(1) In *Clorox* the acquiring company was virtually the only potential competitor of the acquired company, so that the merger had the effect of eliminating virtually all potential competition. In this respect, Commissioner Elman pointed out, the acquisition in *Clorox* "had many of the same effects on competition as a conventional horizontal merger." (App. B, p. 252a.)

But in this case, because GF was not a potential competitor of S.O.S.,[2] the acquisition had no such horizontal aspects.

(2) *Clorox* involved a unique product for which there were no substitutes, and, by definition, the possible exercise of oligopoly power within the market was not subject to any restraint from substitutional competition. But in this case, as Commissioner Elman emphasized, there existed outside of the relevant market a number of giant companies with "vast resources and marketing power" who were developing and selling a variety of close substitute products and were thus exerting a powerful restraining influence upon the exercise of oligopoly power within the relevant submarket. In short, in *Clorox* the acquisition eliminated virtually all external restraining influence, but in this case strong and growing restraining influences continued in force after the acquisition. (App. B, pp. 255-59a.)

(3) One of the evils found in *Clorox* was the achievement by the acquired company of certain advertising cost-savings which, because additional brand advertising in that particular market was not considered socially useful, were thought to create an anticompetitive advantage. But in this case the acquired company was able to achieve certain genuine and desirable efficiencies in transportation and warehousing, as well as in advertising and promotions, and Commissioner Elman did not believe that the genuine efficiencies involved here stood on the same ground as the advertising cost savings involved in *Clorox*. (App. B, pp. 261-62a.)

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[2] The tribunals below explicitly so found. (App. A, p. 20; App. B, p. 234a, 254a; R. 163a [Finding of the Hearing Examiner].)

For the foregoing reasons Commissioner Elman concluded that this case, far from being "simply an echo of *Clorox*" (App. B, p. 249a), broke new ground on issues which were of great importance to the administration of the Clayton Act and that upon a correct legal and economic analysis the acquisition did not violate the statute.

GF petitioned the Court of Appeals for the Third Circuit for review.[3] The Court of Appeals agreed with Commissioner Elman that the case was economically different from *Clorox* (App. A, pp. 19-21), but it nevertheless affirmed the decision of the Commission's three-member majority. Because the case involves important antitrust issues, petitioner seeks certiorari.

I. The Issue of Substitute Products

A. The Facts

Steel wool was one of the first abrasive substances to be used in kitchen scouring devices. (R. 313a, 615-16a.) Over the years various methods of incorporating soap into a steel wool pad were developed in order to supplement the abrasive action of the steel, and the "soap pad" made of steel wool has long been the leading kitchen scouring device. (R. 982a, 1480a, 1490a, 1527a.)

From 1919 to 1946 there were apparently only three manufacturers of steel wool soap pads—the S.O.S. Company, the Brillo Company, and the American Steel Wool Company. (R. 561a.) Between 1946 and 1957 two new manufacturers entered the field, the Durawool Corporation (R. 565a) and the Alloy Corporation (R. 86a-87a, 597a). Each of the five companies manu-

[3] Jurisdiction of the Court of Appeals was founded upon Section 11 of the Clayton Act, 15 U.S.C. § 21 (1964).

factured different types of steel wool devices,[4] and an additional type was introduced into the Canadian market by the Colgate-Palmolive Company. (R. 631a, 1740a-41a.) Following GF's acquisition of S.O.S. the Alloy Corporation dropped out of the business (for reasons wholly unrelated to GF's entry) (R. 86a-87a, 597a, 641a); a company called Demcorp entered for the first time (R. 640a); the B. T. Babbitt Company (Bab-O) made a brief entry (R. 1523a); Colgate-Palmolive introduced its steel wool soap pad into the American market;[5] and both Lever Bros. and Procter

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[4] The "SOS" pad, which was patented in 1918 (R. 982a), is made of interwoven steel fibers in an oval shape, impregnated with a blue soap. (RX 1, R. 1480a.) The Brillo products are "Brillo Green," a plain steel wool pad boxed with a separate cake of soap (RX 2, R. 1490a) and "Brillo Red," a pillow-shaped pad of noninterwoven steel fibers covered with a red soap (RX 1, R. 982a, 1480a). "Brillo Red" once contained, and may still contain, detergent as well as soap. (R. 1749a-50a.) The American soap pad is a roll of fine steel wool with soap spread in the interior. (RX 2, R. 1490a.) The American scour pad is a similar roll for use with a separate cake of soap. (R. 141a.) The Durawool soap pad is round, impregnated with a red soap. (RX 2, R. 1490a.) Demcorp's new "Puffy" pad is a ball of steel wool with a lemon-scented, oil-based soap in a "magic nugget" in the interior. (R. 1527a.) "Paddy," a recent innovation of Brillo, is a small flat steel wool pad with a hard paper back. (RX 5, 1515a.) "S.O.ettes," which were introduced after "Paddy," are small, flat disposable steel wool pads with soft sponge backs. (RX 5, R. 1515a.)

[5] At the close of the hearing below, Colgate-Palmolive was selling its pad in Canada but had not yet introduced the pad in the United States. Following the decision of the Court of Appeals below, GF petitioned the Court of Appeals for leave to adduce new evidence before the Commission to show a number of highly relevant new developments in the market (as established by a supporting affidavit whose factual assertions were in effect conceded), including the fact that in 1966 Colgate-Palmolive had introduced its steel wool soap pad into the United States. The motion (which was denied) and the supporting affidavit are included in the Record and appear at Appendix C to this Petition.

& Gamble have been working on the development of new steel wool pads (R. 580a-81a).

Although steel wool is an effective abrasive, it also has incurable inherent defects, including its rusting and splintering, its harshness on the hands, and its relatively short useful life. (R. 448a, 457a, 520-21a, 523a, 533a, 554a, 590a, 1571a.) Indeed, manufacturers of steel wool soap pads are so well aware of these deficiencies that none uses the words "steel wool" on the package for his product. (R. 590a, 1145a-46a, 1365a-68a, 1457a, 1467a; *see* R. 316a.) Perceiving an opportunity to capitalize on these deficiencies, a number of other manufacturers in recent years have developed new kinds of non-steel kitchen scouring devices employing such abrasive substances as silica, bronze and copper webbing, nylon webbings with bonded abrasives, and various combinations of these and other materials. (R. 68a-70a.) Some of these pads incorporate soap and some do not. All of them are advertised and sold from grocery store shelves—usually side by side with the traditional steel wool pad—to the housewife for use in her kitchen scouring chores. (R. 318a, 477a-78a, 524a, 626a, 659a, 784a, 785-86a, 795a, 893a, 1560a-75a.) Many of these modern non-steel products, several of which have been developed since GF's acquisition of S.O.S., are expressly advertised as being superior to steel wool (R. 120a-21a, 1952a, 1954a), and their manufacturers have deliberately priced their products so as to be competitive with the prices of the traditional steel wool pads, taking into account the useful lives of the products.[6] (R. 171a.)

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[6] A leading example is the so-called "Rescue" soap pad manufactured by Minnesota Mining & Manufacturing Company. It is a long-life pad made of nylon webbing with a highly effective abrasive bonded to the webbing (under a patent obtained in 1960),

The manufacturers of these modern non-steel substitutes include the du Pont Company (R. 1509a-10a), General Mills Corporation (R. 1490a), General Cable Corporation (R. 1480a, 1499a, 1690a), Colgate-Palmolive Company (R. 531a-32a, 580a, 914a), and Minnesota Mining & Manufacturing Company (R. 895a, 1469a-79a), and additional major companies such as the Procter & Gamble Company, Lever Bros., American Home Products, and Union Carbide Corporation have been developing similar substitute products (R. 532a, 580a, 618a, 887a). The new substitute products already on the market have been steadily drawing business away from the traditional pad manufacturers as housewives have switched from the old products to the new. (R. 157a, 516-18a, 534a, 786a-87a, 817a, 1565a.) The record establishes that, since the close of the hearing below, the growth of steel wool soap pads has been stopped entirely and that in 1966, for the first time in history, sales of such pads started into an apparently steady decline.[7]

B. The Opinions Below

The Commission below took the position that, in the context of a broad market encompassing many competitive products, the Commission and the courts have

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and it contains soap. (R. 891a.) The manufacturer testified that he deliberafely set his box price at exactly the price of a box of steel wool soap pads having a comparable useful life. (R. 171a, 893a, 895a, 916a.) "Rescue" is explicitly advertised as being superior to steel wool soap pads (R. 120a-21a), and it appears on the shelves of grocery stores between the Brillo pad and the S.O.S. pad (R. 787a, 892a). Although sold only in test markets at the time of the Hearing in 1964, the Record shows that "Rescue" is now in national distribution. (*Supra* n. 5; App. C, p. 4.)

[7] Sales are now falling at the rate of 4-7% per year. *See* GF's motion in the Court of Appeals, *supra* n. 5; App. C, p. 4.

broad discretion to identify as a "relevant submarket" for the purposes of Section 7 any one of a number of products groupings within the outer boundaries of the market as a whole. (App. B, p. 198a.) Noting a number of Section 7 cases in which products which are "in direct competition" with one another had been separated into distinct submarkets (App. B, pp. 194-95a), the Commission chose as the "relevant submarket" in this case a product category which it characterized as "household steel wool"—*i.e.*, scouring devices made of steel wool, whether or not soap impregnated. (App. B, p. 206.)

GF urged below that, assuming the propriety of the selection, it was incumbent on the Commission under the teaching of *Clorox* to evaluate the role of all competitive influences—including the potential competition of close substitute products—which might serve as a restraint upon the exercise of oligopoly power within the "relevant submarket." The three-member majority of the Commission rejected GF's contention. They flatly held that the competitive influence of the substitute products outside the steel wool submarket was legally irrelevant and entitled to no consideration in the evaluation of the consequences of the acquisition:

> "Respondent argues that 'whatever the technical definition of the product market no rational evaluation of present or future competitive conditions can be made without taking non-steel scouring devices into account.' . . . It is clear, however, under Section 7 of the Clayton Act, that once the appropriate product market for determining the effect of the merger has been defined, the only consideration which is relevant is whether or not there is a reasonable probability that competition in that market may be substantially lessened. . . . *Conse-*

quently, we reject respondent's contention that, whatever the definition of the market may be, we must nevertheless still consider the broader cleaning device market in our assessment of the competitive impact of respondent's merger." (Emphasis added.) (App. B, p. 198a, n. 5.)

Commissioner Elman sharply disagreed. In dissent he pointed out that no realistic appraisal of the structure of the household steel wool submarket, or of the likely future behavior of firms within or contemplating entry into that submarket, could be made without taking into account the emerging competition of substitute non-steel scouring devices. (App. B, pp. 255-60.) He concluded that, given the existence of numerous giant and aggressive manufacturers of new substitute products (as well as other factors), the replacement of the S.O.S. Company by GF in the steel wool submarket had not increased any opportunity for the exercise of oligopoly power within that submarket and had not substantially lessened competition in violation of Section 7. (App. B, pp. 260a-61a.)

Despite the sharp division among the members of the Commission on this important issue, the opinion of the Court of Appeals is silent on the point. The court duly noted GF's argument as to the role of the substitute products and their legal significance [8] but never discussed it at all.

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[8] "Appellant further argues that even if the market definition was technically tenable, the Commission nevertheless erred in assessing the impact of the merger by treating non-steel wood scouring devices as though they did not exist." (App. A, p. 7.)

II. The Issue of Entry Barriers

A. The Facts

As noted above, the record shows that beginning some time before the acquisition and continuing throughout the post-acquisition period there have been a number of potential entrants into the steel wool soap pad business, including the Procter & Gamble Company, the du Pont Company, General Mills Corporation, General Cable Corporation, Minnesota Mining & Manufacturing Company, Lever Bros., American Home Products Company, and Union Carbide Corporation. (R. 531a-32a, 580a, 618a, 887a, 895a, 914a, 1469a-79a, 1480a, 1490a, 1499a, 1509a-10a, 1690a.)

Apart from these potential entrants, following GF's entry into the steel wool business by acquisition, three additional companies have actually entered the market with new steel wool soap pads. They are Demcorp (R. 640a), the B. T. Babbitt Company (Bab-O) (R. 1523a), and Colgate-Palmolive.[9]

B. The Opinions Below

As further discussed below, the three-member majority of the Commission concluded that the S.O.S. business, because of GF's ownership, was in a position to take advantage of certain operating efficiencies which were not available to the S.O.S. Company prior to the acquisition. (App. B, pp. 234a-38a.) The majority also inferred, admittedly without evidence and

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[9] The Commission found that Demcorp was a new entry. (App. B, p. 242a.) It apparently overlooked the evidence as to Bab-O. Since Colgate-Palmolive did not enter the market until after the Commission's decision, the Commission treated that firm as only a "potential competitor" (App. B, p. 219a), but it has now become an actual competitor (*supra* n. 5; App. C, pp. 4-5).

without reference to the character of the identified potential competitors, that GF's presence in the steel wool soap pad business had necessarily created a "psychological" barrier tending to deter potential competitors from actually entering the Market. (App. B, p. 241a.) On this basis the Commission concluded that GF's 1957 entry had raised barriers in the steel wool market to "virtually insurmountable heights." (App. B, p. 219a.) This conclusion was reached in the face of some actual new entry into the market following GF's entry, and without considering whether any of the identified potential competitors would actually be deterred by GF's presence in the steel wool business.

Again Commissioner Elman disagreed with the majority. He took the view that, where in fact there are a number of identified major companies standing at the edge of the market in the role of potential competitors, a determination as to whether a merger has raised entry barriers sufficiently to violate the statute requires an evaluation of the character and resources of the identified potential competitors to determine whether they would in fact be deterred by the merger from entering the market. Accordingly, Commissioner Elman examined the identity of the potential competitors and concluded that there had been no raising of entry barriers so as to remove those companies as a restraining influence within the steel wool submarket:

> "On no realistic appraisal of the market would it appear that du Pont, Colgate, and these other giants are likely to be discouraged from taking on S.O.S. as a competitor because it has been acquired by General Foods. *In relation to these firms, the substitution of General Foods for S.O.S. has surely raised no barriers to entry or eliminated the potential competition that now exists.*" (App. B, p. 259a.) (Emphasis added.)

On appeal GF, pointing to the identity of the leading potential competitors, vigorously challenged the majority's finding that the acquisition had raised entry barriers to "virtually insurmountable heights." (*See Brief for Petitioner in the Court of Appeals,* pp. 22-23, 33-35.) Faced with this challenge and a divergence of view in the Commission, the Court of Appeals took a middle ground. It did not endorse the majority's "virtually insurmountable heights" conclusion, but it did hold that there was substantial evidence that entry barriers had been raised to *some* extent. (App. A, pp. 18-19, 21.) The court did not consider, as Commissioner Elman did, whether the increase in entry barriers was sufficient to reduce the competitive influence of the large identified potential competitors who were actually standing at the edge of the market, or whether the increase was sufficient to deter actual entry by any of these specific firms.

III. The Issue of Operating Efficiencies

A. The Facts

As a ground for invalidating the merger, counsel supporting the Complaint repeatedly urged upon the Commission and the court below that the S.O.S. business, as a result of its acquisition by GF, did or could achieve cost savings in transportation and warehousing as well as in advertising and promotion. Particularly stressed, for example, were the "important advantages" accruing to S.O.S. and its customers from GF's "stream-lined" and "market-centered distribution system," including "warehousing by the most efficient time and labor-saving devices," "distribution by the most advantageous rate of transportation," coordination of invoicing, credit arrangements, and other phases of purchase order processing, and other "obvious econ-

omies of scale." (*See, e.g., Brief for the Commission in the Court of Appeals,* pp. 12-13, 20-21, 45, 48, 55-57, citing R. 1097a-98a, 1392a.) Taking advantage of these "handling and transportation economies," Commission counsel said, a retailer could obtain S.O.S. pads at a lower unit price (*id.* at pp. 13, 21, citing R. 1059a, 1304a) and was "enabled to run his business more economically by holding his investment in inventory to a minimum" (*id.* at pp. 13, 21, citing R. 375a-77a, 1053a-54a). The Commission and the Court of Appeals accepted these propositions as fact and found that all these cost savings resulted from the merger. (App. A, pp. 6, 18-19; App. B, pp. 210a-11a, 217a, 222a, 237a, 238a.)

B. The Opinions Below

The majority of the Commission relied expressly upon the alleged operating efficiencies which were or could be achieved by the S.O.S. business as a result of the acquisition as a basis for holding the acquisition unlawful under Section 7. (App. B, pp. 210a-11a, 217a, 222a.) Commissioner Elman dissented. He said:

> "The Commission also includes, as a ground for holding this merger unlawful, purported cost savings accruing to S.O.S. through efficiencies in warehousing and distribution. . . . Economic efficiencies should not be a ground for the invalidation of a merger. Indeed, the promotion of competition has for one of its goals the achievement of greater efficiency. *See* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1323-28." (App. B, p. 261a).

The Court of Appeals disagreed with Commissioner Elman and sustained the Commission majority. (App. A, pp. 6, 18-19.)

REASONS FOR GRANTING THE WRIT

None of the three questions raised in this case was raised by the facts in *Clorox,* but each is a question which is likely to arise in many conglomerate situations in the future. Thus *Clorox* did not involve the economic and legal significance of substitutional competition as a factor existing outside of, but exerting a competitive influence within, the relevant product market. But most products are subject to some degree of substitutional competition, and the question of the significance of such competition may often be crucial in conglomerate cases.[10] Similarly, although in *Clorox* there were no identified potential competitors other than the acquiring company, it is to be expected that in many conglomerate cases, as here, there will be other identifiable potential competitors exerting an influence upon the market after the acquisition, and in such cases the question of the significance of the character of those competitors will arise. Finally, while in *Clorox* no increases in genuine economic efficiency were involved, genuine increases in efficiency of the kind involved in this case will in all probability be encountered in many conglomerate cases.[11] In these respects the resolution of the questions presented in this case—the first true conglomerate case to reach this Court[12]—is likely to have a broad impact in the merger field in the future.

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[10] *Cf.* BOCK, MERGERS AND MARKETS 159 (6th ed. 1968).

[11] *See* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1315 (1965); Hale & Hale, *More on Mergers,* 5 J. LAW & ECON. 119, 125 (1962); PENROSE, THE THEORY OF THE GROWTH OF THE FIRM 129-30 (1959).

[12] As emphasized by Commissioner Elman below, the Clorox acquisition was analogous to a horizontal merger because Procter was a potential competitor of Clorox. *See* p. 4, *supra.* Here there was no such prior economic relationship between the acquiring and the acquired companies.

The importance of framing intelligent rules with respect to conglomerate mergers (which have become the principal vehicle for the sale of capital assets in the United States economy today [13]) cannot be overemphasized. Unduly severe interdiction of conglomerate mergers can and will stifle the opportunities and incentives of potential new innovative enterprises which are considering formation and entry into particular markets. Undiscriminating merger rules may thus actually raise entry barriers so as to protect and preserve existing oligopoly power [14] and, in addition, lead to an increase in general concentration.[15] It is therefore important for this Court in this case to insure that the rules which are to govern conglomerate mergers for the immediate future are designed to enhance rather than to inhibit competition.

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[13] *See Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, pursuant to S. Res. 40,* 89th Cong., 1st Sess., pt. 2, at 516 (1965).

[14] *See, e.g.,* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1317-18 (1965) ("There are thus strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps." p. 1318.); KAYSEN & TURNER, ANTITRUST POLICY 127-29 (1959).

[15] *See* BAIN, INDUSTRIAL ORGANIZATION 204, 206-07 (1959); Turner, *supra* n. 14, 78 HARV. L. REV. at 1326-27.

I. On the Important Legal and Economic Question of the Relevance of Potential Competition From Close Substitute Products, the Rule Announced Below Conflicts With Prior Holdings of This Court and With Accepted Economic Doctrine

In prior merger cases this Court has repeatedly recognized a fundamental economic and legal principle which is applicable here. In *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964), and in *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964)—and of course in the *Clorox* case as well—this Court recognized that with respect to a particular market there may be external forces at work which, though they exist outside the market, may have a decisively important procompetitive influence upon the behavior of firms within the market. In each of the three cited cases the external force involved was "potential competition" in the form of one or more extra-market firms whose potential entry tended to restrain the exercise of oligopoly power within the market. In each case the Court considered it decisively important to determine whether the challenged transaction had either eliminated or reduced the influence of potential competition to such a degree that competition within the market had been substantially lessened within the meaning of Section 7.

This case involves a precisely comparable extra-market force—namely, the emerging competition of substitute products being developed and sold by numerous aggressive rivals with well-established reputations for marketing judgment and success. In addition to acting as a restraining influence upon the market behavior of steel wool pad manufacturers, they are actu-

ally drawing business away from that submarket at a rate which foreshadows the demise of the submarket itself.[16] The tribunals below have flatly held that these economic realities are legally irrelevant for Section 7 purposes. In so doing they have adopted a principle which squarely conflicts with the cited decisions of this Court.

Economically, of course, there is no difference between the restraining influence of potential entry into a given market and the influence of emerging substitutional competition. Both these forms of potential competition create, for firms within the market, the threat that their customers will leave them if they try to take advantage of imperfectly competitive conditions.[17] The threat of a shift of customers to a substitute product will act as a restraining influence upon the exercise of oligopoly power within a submarket in exactly the same way as the threat of a shift of customers to a new entrant. Indeed, if anything, substitute products constitute a more immediate and effective restraint because they are already in existence.[18] The economic equivalence of these two forms of potential competition has long been recognized by authoritative commentators from both the economic and legal disciplines. *See* COUNCIL OF ECONOMIC ADVISORS ANNUAL

[16] The affidavit in support of GF's motion in the Court of Appeals (*supra* n. 5; App. C, p. 4) establishes that sales of steel wool scouring devices are now falling at the rate of 4-7% per year. *See also* R. 157a, 534a, 1565a.

[17] As noted by Professor Bain, the availability and closeness of substitutes—*i.e.*, the degree of "product differentiation"—is as much a dimension of market structure as the "condition of entry." Entry and substitutibility are two of "the most important conditioning influences on market performance." BAIN, INDUSTRIAL ORGANIZATION 211-14, 264 (1959).

[18] *Cf.* BAIN, BARRIERS TO NEW COMPETITION 10-11 (1956).

REPORT, in PRESIDENT'S ECONOMIC REPORT 132 (1965)[19]; REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 322 (1955).[20] And in *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), this Court itself recognized the legal and economic significance of emerging substitutional "inter-industry competition" for Section 7 purposes.[21]

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[19] "In many industries, a high concentration of output among a small number of firms is not inconsistent with high active competition, especially where there is also a fringe of small firms, where entry of new firms is easy, *or where there exists active competition from substitute products.*" (Emphasis added.)

[20] The REPORT states as follows:

> "In evaluating the market forces which together would characterize effective competition, the rivalry of close substitutes which may, for other purposes, be classified as belonging in other industries has, in varying degree, the same kind of effect as that of competing producers of the same or differentiated products or services classified within the same industry. Technical advance has often made the rivalry of close substitutes quite effective."

In *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 176 (1964), this Court quoted with approval the REPORT's exposition of restraints on oligopoly power, including its reference to existing rivals as well as potential entrants:

> "The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, *rival sellers, whether existing competitors or new or potential entrants into the field,* would keep this power in check by offering or threatening to offer effective inducements . . . ." (Emphasis added.)

[21] The Court pointed out that the "possibility" of "customer diversion" to a substitute product "over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive level or engaging in other comparable practices." 378 U.S. at 465-66.

Disregarding this Court's clear effort in *Clorox* and earlier cases to make legal analysis conform to economic analysis, the tribunals below have declared that the highly significant economic fact of emerging substitutional competition is legally irrelevant for Section 7 purposes. They have held in effect that, no matter how clear the impact of such substitutional competition, the competitive consequences of a conglomerate merger are to be determined by treating such competition as though it did not exist.[22] This novel legal fiction is completely at odds with the realistic economic principles followed by this Court in *Clorox* and earlier merger cases. As indicated by Commissioner Elman in his strong dissent in this case, the rule adopted below constitutes "a long step" in the wrong direction in an

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[22] The findings upon which the Commission based its selection of the relevant product submarket—for instance, that steel wool manufacturers did not take the nascent substitutional competition into account in their pricing decisions at the time of the merger—are in no way inconsistent with the facts bearing on the future restraining influence of potential competition from substitute product manufacturers. Indeed, Commissioner Elman agreed with the majority's choice of the steel wool pad submarket. It was the size and experience of the companies engaged in the substitutional competition; the degree of their investment and their announced expectations; the vigor of the innovation and the likelihood of long-run consumer response to it—all established in the Record—which convinced Commissioner Elman that adequate and increasing restraints upon the exercise of oligopoly power in the steel wool submarket remained and that the merger had not lessened competition. These were the precise criteria for the evaluation of prospective potential competition announced by this Court in the cases cited above. *E.g.*, *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *United States* v. *Continental Can Corp.*, 378 U.S. 441, 452, 455 (1964); *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 174 (1964); *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 660 (1960). As noted, the majority of the Commission and the Third Circuit viewed these economic facts as legally irrelevant and refused to consider them.

area where it is particularly important that the legal rules be evolved with caution. In view of the fact that conglomerate cases are necessarily going to turn primarily upon the question of the role of potential competition, it is of great importance that this Court resolve the question in this case.[23]

II. The Reliance of the Court Below on a Novel Abstract Rule—That Entry Barriers May Be Analyzed Without Regard to the Character of Identified Potential Entrants—Is Inconsistent With Accepted Economic Principles and With the Decisions of This Court

As previously noted, the Commission majority's finding that barriers to entry into the steel wool submarket had been raised to "virtually insurmountable heights" was challenged as untenable, both by the dissenting opinion and by GF on appeal, in view of the size and strength of the identified potential competitors.[24] The Third Circuit did not advert to this challenge. Instead it held in effect that the applicable test was *not* whether entry barriers had been raised too high (*i.e.*, to the Commission majority's "virtually insurmountable heights"), but whether they had been raised at all. The character of the potential competitors, and whether

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[23] *Cf.* Bock, Mergers & Markets 159 (6th ed. 1968). "The resolution of this issue concerning the relevance of substitute products and active rivals is, therefore, critical to the future status of mergers of the General Foods-S.O.S. type."

[24] Since the Commission majority refused to consider the influence of potential competition in the form of substitute products, its conclusion that oligopoly power had been substantially increased and competition thus substantially lessened in the steel wool submarket would be legally insufficient even if its finding as to entry barriers were valid.

an increase in entry barriers had substantially affected *their* restraining influence, went unmentioned.

The test thus applied by the Third Circuit not only departs from the theory adopted by the Commission below [25] but, more importantly, is in conflict with the basic criteria for the appraisal of potential competition announced by this Court in *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1960), *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964), and *Clorox*, and with authoritative economic teaching on the use of entry barrier analysis in merger cases.

The opinions of this Court in *Penn-Olin*, *El Paso*, and *Clorox* make clear that tribunals must evaluate the strength and character of potential competitors in estimating their impact upon market behavior. For example, in *El Paso* the Court held that the effect of a potential competitor on competition in a market

> "is determined by the nature or extent of that market and by the nearness of the absorbed company to it, *that company's eagerness to enter that market, its resourcefulness, and so on.*" 376 U.S. at 660. (Emphasis added.)

In *Penn-Olin* the Court stated:

> "Potential competition, *insofar as the threat survives* . . . may compensate in part for the imper-

[25] It is a settled rule in this Court, as most recently reiterated by Mr. Justice Harlan concurring in *Consolidated Foods Corp.* v. *FTC*, 380 U.S. 592, 601 (1965), that a court of appeals may not sustain a decision of an administrative agency on a theory different from that articulated by the agency. *See Burlington Truck Lines Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *accord, NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

> fection characteristic of actual competition in the great majority of competitive markets . . ."
>
> ". . . The existence of *an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce* waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." 378 U.S. at 174. (Emphasis added.)

And in *Clorox* the Court noted:

> "[T]he barriers to entry *by a firm of Procter's size and with its advantages* were not significant." 368 U.S. at 581 [26] (Emphasis added.)

But the Third Circuit here made no effort to evaluate the strength of the identified potential entrants in determining whether competition within the steel wool submarket had been affected by this conglomerate merger.[27] Quite the contrary, the court looked to whether entry barriers had been raised *in the abstract,* and assumed that oligopoly power within the market had been increased "to the extent" that the barriers had been raised. (App. A, p. 21) The court failed to ask the crucial question which makes entry barrier analysis relevant to an estimation of market power—whether, in the words of *Penn-Olin,* "the threat [of

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[26] In *Clorox,* Procter was "virtually the only" potential entrant. *See* 63 F.T.C. at —, [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673 at 21,584 (FTC 1963). Its potential competition was, of course, eliminated by the merger.

[27] There were ample facts in the Record to permit such an evaluation. R. 531a-32a, 580a-81a, 618a, 631a, 887a, 895a, 914a, 1469a-79a; RX 1; R. 1480; RX 2, R. 1490a; RX 3, R. 1499a; RX 4, R. 1509a-10a; R. 1632a, 1652a, 1664-65a; 1682-83a, 1690a, 1846a-47a, 1740a-41a, 1962a-94a, 1993-94a.

potential competition] survives" the raising of entry barriers.

Obviously an increase in entry barriers does not permit an oligopolist to take advantage of his market power unless it significantly deters potential entrants from entering. A mere comparison of the height of entry barriers after a conglomerate merger with their height before tells nothing. In simplistic terms, raising a barrier by 100%, which would certainly be a "substantial" increase, will not protect an oligopolist from potential rivals who can easily surmount the new height. Conversely, a small increase which might be regarded by the Third Circuit as "insubstantial" could free oligopoly power if it resulted in barring the important potential entrants. Economic texts explicitly recognize that the effect of entry barriers varies with the character of the potential entrants,[28] and the instructions of this Court in *Penn-Olin, El Paso,* and *Clorox* reflect this accepted understanding. The Third Circuit's mistaken view of entry barriers as a self-sufficient index of competitive conditions is thus in conflict with both law and economics.

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[28] *See, e.g.,* BAIN, BARRIERS TO NEW COMPETITION 7-10 (1956):

> "The condition of entry is measured by the long-run gap between minimal cost and price which the most favored firms can reach without attracting entry—but whose entry and how much? . . . It is not realistic to assume that all potential entrants are alike either in their capacity to enter or with respect to the gap which will just induce them to enter. . . . If the condition of entry refers to the condition for the inducement to entry of successive finite numbers of firms it should also logically refer to the *size* of each entry. . . . [T]he condition of entry to an industry . . . refers to advantages which established firms in an industry have over potential entrant firms. . . ."

And it is no small error. Applied as a general rule it could have a widespread economic impact. It could arbitrarily prohibit conglomerate mergers which do not in fact change market structure, and validate mergers which do in fact eliminate restraint on oligopoly power. Either result would be anticompetitive.

III. The Lower Tribunals' Reliance Upon Achievement of Operating Efficiencies as an Affirmative Ground for Prohibiting a Conglomerate Merger is a Radical Departure From the Accepted Goals of Antitrust Policy

In concluding that this conglomerate merger had an anticompetitive effect, the Third Circuit and the Commission majority relied principally upon evidence that GF could achieve cost savings in transporting and warehousing soap pads ("distributional efficiencies") and in advertising and promoting them. Their finding that GF could operate more economically was the crux of their decision.

Reliance upon efficiency as an affirmative ground for invalidating a merger is not a minor variation on the basic theme of antitrust policy. As Commissioner Elman pointed out in his dissent below, it represents a major departure from accepted antitrust policy, and it flatly contradicts the teaching of commentators accepted as authoritative by this Court.[29] It is a novel

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[29] *See* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1339 (1965) ("Economies of scale in production, distribution, research, and the like should in no event be a factor militating against the lawfulness of conglomerate (or other) mergers"); Kaysen & Turner, Antitrust Policy 129 (1959); Bain, Barriers to New Competition 207, 212 (1956) ("[A]s to the sorts of entry barriers which may be legitimately attacked, it was observed that those resting on real economies

rejection of the carefully reasoned premises of the Commission's own landmark opinion in *Clorox*,[30] and of the position taken by the Solicitor General only last year in his Brief to this Court in *Clorox*:

> "We would agree with the court of appeals that, in general, advantages afforded by a merger which reflect simply greater efficiency ought not be a basis for holding the merger illegal; efficiency is, after all, a prime goal of antitrust." *Brief for the Federal Trade Commission* at 47, *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967).

Mr. Turner has succinctly summarized the "overpowering" reasons for rejecting the rule adopted below:

> "First, there is the enormous social interest in progress and efficiency, which has represented one of the primary bases for the policy of promoting competition as it has in fact evolved. Second, to forbid mergers that would or might produce substantial efficiencies would narrow substantially the category of acceptable mergers, thereby drastically

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of large scale plant and firm (whatever their importance) should not and probably could not be removed, because of the adverse effects on efficiency of such removal." (p. 207.) "That economies of scale in production and distribution do not loom large as the basis of barriers to entry is fortunate for the policy-maker, because there is relatively little that can or should be done about them." (p. 212.))

[30] *See FTC* v. *Procter & Gamble Co.*, 63 F.T.C. —, —, [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673 at 21,580, 21,585-86 (FTC 1963). Economies of production or physical distribution were not involved in *Clorox*. *Id.* at 21,585. *See also* Elman, *Clorox and Conglomerate Mergers*, 36 ANTITRUST L.J. 23, 25 (1968) ("The Commission emphasized the character of the particular cost advantages, vis-a-vis potential entrants, that the merger conferred on Clorox, finding them not to be the kind of "efficiencies" that antitrust policy is intended to encourage.")

weakening the market for capital assets and seriously depreciating the price that entrepreneurs could get for their businesses when they wish to liquidate. Such a policy would seriously interfere with maximum exploitation of productive resources; and not only might it have adverse long-run effects on entry and growth of small business, but it would also be clearly against the interests of small businesses already in being. It can be at least doubted that if Congress had focused on the issue, it would have wished such a result. Third, the protection that this policy would afford to small business, except in the short run, is at best highly conjectural and probably negligible. There is no doubt that in most instances, certainly when efficiencies from integration are substantial, the same adverse consequences to small business will sooner or later be visited through internal expansion by large firms. The last two points are interrelated: it would hardly be a favor to small businesses threatened with extinction by expanding large rivals, to deprive them of the opportunity to sell to large outside firms at the better prices the large firms would be willing to pay because of the prospects of achieving efficiencies of integration." *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1326 (1965).

The rule adopted below—that the achievement of operating efficiencies is, *per se,* a ground for invalidating a conglomerate merger[31]—should not be al-

[31] Petitioner does not here contend that the fact that a merger results in efficiencies for the acquired firm may be asserted as a defense for an otherwise anticompetitive merger. Petitioner's argument is that it was improper for the tribunals below to assert the fact of such efficiencies as an affirmative basis for holding the merger illegal. In addition, if this Petition is granted petitioner intends to argue the subsidiary question of the appropriateness of divestiture as a remedy, as opposed to an injunctive restriction on cost-saving practices.

lowed to stand without review on the merits by this Court.[32]

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[32] In addition to their novel reliance upon distributional economies, the Commission majority and the Third Circuit assumed that this Court's treatment of the advertising cost savings in *Clorox* applied to the advertising savings found here. The Government in *Clorox* took the position that the generally accepted principles with respect to the antitrust treatment of cost savings did not apply to heavy brand advertising of physically and chemically identical products for which there were no substitutes. The only result of such cost savings, it was argued, would be more advertising which could have no informative function, and this advantage could thus be deemed anticompetitive. This Court agreed. But *Clorox* does not establish a general rule "that brand advertising is inherently or necessarily wasteful," even "where competitive brands are physically identical." *See* Elman, *Clorox and Conglomerate Mergers*, 36 ANTITRUST L.J. 23, 26 (1968). And in this case steel wool products are different from one another—to the point of separate patentability—and different from their non-steel substitutes. The carefully articulated premises of the *Clorox* opinion do not obtain here, and the Commission's reliance upon advertising and promotional cost savings in this case raises new and important questions. *See* BOCK, MERGERS AND MARKETS 150-51 (6th ed. 1968). Commentators have noted sound policy reasons against such an undiscriminating condemnation of advertising cost savings. *See, e.g.*, Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1336-37 (1965).

In lieu of attempting to supply reasons for their reliance upon advertising cost savings in the circumstances of this case, the Commission majority and the Third Circuit sought to draw a parallel between *physically and chemically identical* liquid bleaches and qualitatively different steel wool scouring devices by characterizing the latter as being *"functionally identical."* On this basis they viewed this Court's treatment of advertising in *Clorox* as automatically applicable. This reasoning process, however, would radically expand the *Clorox* holding to all product markets, because all products in competition with one another can be characterized as "functionally identical." Plainly this Court did not hold in *Clorox* that all advertising is socially valueless.

CONCLUSION

It is respectfully suggested that every one of the conglomerate merger rules in question here, even considered individually, deserves this Court's consideration. Taken together, their scope and importance present an imperative case for review. As matters now stand, the opinion of the Third Circuit is the only source of specific guidance, and this case is the only foreseeable opportunity for this Court to prevent the economic harm which, we submit, must follow if the Third Circuit's rules are generally followed, or the years of costly and disruptive litigation which will occur if they must be challenged in other cases.

For the reasons set forth, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15910

GENERAL FOODS CORPORATION, *Petitioner,*
v.
FEDERAL TRADE COMMISSION, *Respondent.*

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE FEDERAL TRADE COMMISSION

Argued June 6, 1967

Before STALEY, *Chief Judge,* HASTIE, *Circuit Judge,* and SHERIDAN, *District Judge.*

Opinion of the Court*

(Filed November 9, 1967)

By STALEY, *Chief Judge.*

Appellant, General Foods Corporation (hereinafter "G.F."), seeks to have reviewed and set aside a final order of the Federal Trade Commission. The Commission's order required G.F. to divest itself of all the S.O.S. assets acquired in violation of § 7 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).[1]

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* The opinion of the Court of Appeals has been reproduced as it appears in the certified Record in this Court. Where typographical and other errors have been corrected in the Federal Reporter they have been marked by inserting "[sic]."

[1] The pertinent portion of the statute provides:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).

The precise determination was that G.F.'s acquisition of S.O.S. "will in fact substantially lessen competition in the steel wool pad market."

Both before and after the acquisition, which occurred on December 31, 1957, the major source of revenue for S.O.S. came from the sale of its household steel wool pads. These pads are produced by a shaving process in which a specifically manufactured steel wool wire is drawn through a machine containing a series of cutting knives. As the wire is drawn against the knives, strands of steel wool with triangular cross sections are shaved off and collected in ribbons. Thereafter, these ribbons are formed into balls or pads, the majority of which are impregnated with soap, dried, and packaged for sale.

Steel wool pads make a particularly effective abrasive. The three exposed cutting edges or cross sections perform in much the same manner as a knife abrasing by cutting or shaving the surface to which the steel wool is applied. With the addition of soap to the pad to facilitate its abrasive action, steel wool makes a highly effective scouring and cleansing agent.

The steel wool cutting machines are comparatively large, complicated machines, not generally available on the open market, but are custom made to the manufacturer's specifications. A German manufactured machine is available but is not as efficient as its American counterpart. The machines can be used for no other function than the production of steel wool. Wool manufactured from materials other than steel are impractical because of the high cost of the raw materials.

G.F. is one of the largest producers and distributors of packaged food in the United States.[2] All its products are

[2] G.F. is divided into five operating divisions which manufacture and distribute its products—the operations of the five divisions are supported by a Distribution Sales Service Division, an Institu-

low-priced high-turnover household consumer commodities sold to customers through the same grocery and supermarket outlets as are S.O.S. steel wool soap pads. Between 1955 and 1964, its net sales rose from $825 million to $1.3 billion, and its net assets from $279 million to $436 million, an increase of 57.6% and 56.2% respectively.

Because the self-service outlet is the primary source of distribution for its products, G.F. endeavors to create a desire for a particular product in the mind of the shopper, thereby enabling her to make a distinction among the different brands of a similar commodity. It is "an unrelenting effort to presell the housewife."[3]

Mass advertising and market promotions are essential factors in the effort to achieve this goal. In 1957 G.F.'s advertising and sales promotions aggregated $69 million, and in 1958 $87 million. By 1961, G.F. ranked third among all national advertisers, with most of its advertising expenditures going into television advertising.

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tional Food Service Division, and a Technical Center for research. Each division is headed by a general manager who reports to a corporate vice-president and who is responsible for executing his own "business plan" following review and approval by higher levels of authority. Each division consists of regional sales districts with each division having its own sales force. The exception to this is the "Kool Aid" division, which distributes its products through independent brokers.

[3] Advertising, according to G.F., embraces all phases of commercial communication with consumers, and all of the many consumer "deals" and incentives. Between 1957 and 1964, G.F. more than doubled its expenditures on consumer promotions, from $9 million to $18.9 million.

Similarly, G.F. also was of the opinion that a successful marketing program should include not only persuasion of the housewife to select G.F.'s products from the shelves but also the retailer to place them on the shelves. Commensurate with this idea, G.F. spent $9.8 million on trade promotions in 1957. Six years later, its expenditures in this area had more than tripled, rising to $31.5 million.

Appendix A

Prior to the acquisition, the steel wool industry had been an almost perfectly balanced duopoly.[4] But in terms of regional, as distinguished from national sales, S.O.S. managed to achieve a monopoly position in many areas.[5] G.F., however, was not satisfied with the market position of the company it acquired. Soon after the acquisition, appellant concluded that the entire marketing and advertising approach of S.O.S. needed rejuvenation. This task was entrusted to an advertising agency then handling other G.F. products. The new agency succeeded in enhancing the S.O.S. image by skillfully emphasizing different aspects of the product than had previously been featured and by per-

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[4] In 1957, the total sales for the steel wool industry amounted to $28.6 million. The sales of the largest competitor, S.O.S., amounted to $14.6 million, or 51%, and those of Brillo, to $13.6 million, or 47.6%. Three small producers accounted for the remaining 1.4% of the total sales. None of these smaller companies had sales of over a half-million dollars.

In 1957, S.O.S. had net assets of almost $6 million, while Brillo's assets, in 1958, amounted to $8 million. None of the other industry competitors possessed assets of as much as a half-million dollars.

[5] In April-May of 1957, S.O.S.' sales represented 77.5% of total sales on the Pacific coast, 75% in Chicago, 68.5% in the west-central region, 65.7% in the south-west region, 60% in New England, 58.4% in the east-central region. Brillo scored very heavily in the metropolitan New York area, accounting for almost 77% of total sales there.

Traditionally, the industry has sold its products on a delivered-price basis on all orders exceeding a minimum amount with the manufacturer absorbing the cost of transportation. Due to the high cost of shipping, the manufacturer confined the distribution of its product to the region of its plant's location. Only S.O.S. and Brillo, with higher prices than the smallest companies, were in a position to absorb the high freight.

suading G.F.'s management that they should place an almost total reliance on television advertising.[6]

A survey of sales' statistics for the household steel wool industry reveals the dramatic change that G.F. was able to effect. During the period from 1955 to 1957 total sales in the industry rose from $24.2 million to $28.6 million, a market expansion of over 18%. The sales of S.O.S., however, increased by only 14.5% from $12.7 million in 1955 to $14.6 million in 1957. S.O.S. thus failed to keep pace with the expanding market, its share falling from 52.8% in 1955 to 51% in 1957. Contrasted with this decline is the rise of Brillo's market share during the same period, going from 45.7% in 1955 to 47.6% in 1957. Brillo's sales increased by 23.4%, a rate markedly more rapid than that for the industry as a whole.

The downward trend in the market position of S.O.S. continued for a period of time after the acquisition due to G.F.'s preoccupation with the integration of S.O.S. into its own organization. Brillo, during this same period, continued to grow faster than the market; its sales increased, for example, from $14.4 million in 1958 to $14.9 million in

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[6] Prior to the acquisition, in the period from 1954 through 1957, S.O.S. spent approximately $1.25 million yearly for television advertising. After the acquisition, in the period from 1960 to 1963, expenditures rose to a yearly average of $2.25 million, an increase of approximately 80%.

One reason for the increased expenditures was a decision to advertise on more expensive evening shows. S.O.S. had formerly recognized that advertising on nighttime shows was preferable but had felt that the expense was prohibitive. G.F., however, as one of the nation's largest purchasers of television advertising, could command some of the choicest shows at prime time evening hours. And since S.O.S. advertising could be combined with that of other G.F. products, S.O.S. not only gained access to choice shows at prime time but earned G.F.'s greater discounts computed on the basis of G.F.'s huge combined advertising purchases for all its products.

1959, a gain of 3.8% as compared to a total market expansion of 2.8%.

Beginning in 1960, with the post-acquisition period coming to a close, the advantages derived from G.F.'s great competitive strength began to make themselves evident, and the fortunes of S.O.S. took an upward turn. Sales began to accelerate sharply and at a much faster pace than those for the total industry.[7] Between 1959 and 1962, the sales of S.O.S. rose from $15.2 million to $19.2 million, a gain of 26.5%. Total industry sales, however, increased by only 11.5%, from $30.7 million to $34.2 million. Sales of S.O.S., therefore, expanded at more than twice the rate of the household steel wool market, and the market share of S.O.S. grew from 49.4% in 1959 to 56% in 1962.

In the face of this remarkable comeback by S.O.S., Brillo's position deteriorated rapidly. Even though industry household steel wool sales increased by 11.5%, Brillo's sales actually decreased from $14.9 million in 1959 to $14.3 million in 1962, a decline of 4.2% in an expanding market.[8] Confronted with steadily falling sales, a

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[7] Trade and consumer promotions for the sale of S.O.S. pad were also more energetically engaged in by G.F. And owing to its integration in G.F.'s market-centered distribution system, S.O.S. would naturally benefit from the system's attendant advantages. The integration enabled S.O.S. to induce purchases of its products by: (1) granting customers discounts based on pooled purchases of the products of G.F.'s various divisions; (2) giving customers the convenience of including orders of S.O.S.' products in their orders of other G.F.'s products; and (3) improving national availability.

[8] Nowhere is the contrast between G.F.'s power in the market and Brillo's inability to cope with this power painted more starkly than in the most important local market in the United States, New York. Twenty per cent of all soap pad consumption takes place there. With its manufacturing facilities located in the area, Brillo dominated the market prior to the merger, outselling S.O.S. at

dangerously declining market share, and mounting advertising and promotional expenses, Brillo, in December 1963, ceased operations as an independent company and merged with Purex Corporation, Ltd.[9]

I.

Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition or tend toward monopoly "in any line of commerce." Prohibition of a merger depends, not upon the form it assumes, but upon the realities of the market in which the merged companies operate. Federal Trade Commission v. Procter & Gamble Co. (hereinafter "Clorox") 386 U.S. 568 (1967); Reynolds Metals Co. v. Federal Trade Commission, 309 F.2d 223 (C.A.D.C., 1962). The fact that different products may in some sense be competitive with each other is not sufficient to place them in the same market if by themselves they constitute distinct product lines. United States v. Aluminum Co. of America (Alcoa-Rome Cable), 377 U.S. 271 (1964). Nor does the availability of substitute products

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retail during August and September 1959, by almost 6 to 1 (84.9% v. 15.1%) on a per pad basis.

For years S.O.S. had attempted, without success, to penetrate the New York City market. After the acquisition, however, G.F. was able to effectively realize a substantial increase in S.O.S.'s share of this market. Resulting largely from advertising, by September 1963, G.F. had gained control of 31.8% of the combined S.O.S.-Brillo retail market, reducing Brillo's share to 68.2%.

Faced with this vigorous competition not only in New York City but throughout the country, Brillo countered by introducing a new package and by escalating its advertising and promotional expenditures. Brillo also began the heavy use of consumer and trade promotions, although, in previous years, it had resorted to these devices only sparingly. Despite these efforts, Brillo fell further and further behind.

[9] Purex is a multi-product manufacturer and distributor of household cleaning agents, having total sales of about $127 million in 1963.

compel the conclusion that they belong in the same relevant market. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), Reynolds Metals Co. v. Federal Trade Commission, supra.

In Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962), the Supreme Court addressed itself to the task of clarifying some of the uncertainty surrounding the concept of relevant market. There, the Court said:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use of [sic] the cross elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as *industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.*" (Emphasis supplied.)

In the present case, the Commission followed, as far as possible, the guidelines laid down in *Brown Shoe.* It found that the appropriate line of commerce or relevant product market within which to test the impact of the G.F.-S.O.S. merger was household steel wool. Appellant challenges this finding, accusing the Commission of "untenable gerrymandering" because of its failure to include in the relevant market numerous nonsteel wool household aids that G.F. introduced into the record. Appellant further argues that even if the market definition was technically tenable, the Commission nevertheless erred in assessing the impact of the merger by treating nonsteel wool scouring devices as though they did not exist.

Appendix A

At the outset, it is important to note that G.F. does not quarrel with the legal principles that guided the Commission. Rather, appellant contends that the Commission not only did not find sufficient facts to satisfy the *Brown Shoe* criteria, but that many of the facts that were found had no basis in the record. On this latter point the law is clear: the Commission's factual findings "if supported by evidence," are conclusive. See 15 U.S.C. § 45(c) (1964); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487, 80 [sic] (1951). We have long recognized that "our job is not to retry [a] case. We have no right to substitute a different view from that of the Commission so long as we have determined that its findings have substantial support in the whole record." C. Howard Hunt Pen Co. v. Federal Trade Commission, 197 F.2d 273, 278 (C.A.3, 1952). Suffice it now to say that we find there is substantial evidence to support those facts found by the Commission. We shall shortly elaborate on this point, but first we turn to appellant's argument that there were insufficient facts for the Commission to determine that the relevant market in this case was household steel wool.

It is urged that *Brown Shoe* enumerates seven factors to be considered when evaluating the relevant product market, and that the Commission erred by ignoring the significance of the inapplicability to this case of two of the seven *Brown* criteria. It is true that the Commission did not make a special finding as to the existence of *specialized vendors* and *distinct customers*, but we do not think that this, in itself, indicates that the relevant market was erroneously delineated. Our reading of *Brown Shoe* discloses no requirement that each of the seven criteria must be present in every merger case. In fact, there is at least one case where a well-defined submarket was held to exist where only three of the *Brown* criteria were present. Reynolds Metals Co. v. Federal Trade Commission, 309 F.2d 223 (C.A.D.C., 1962).

Appendix A

We now return to G.F.'s contention that the Commission erroneously found many of the crucial facts in this case. As mentioned earlier, we think this argument is without merit. The Commission found that there was a definite *industry recognition of the household steel wool submarket as a separate economic entity.* This finding is supported by testimony of several household steel wool producers stating that they only looked to other steel wool producers in setting prices and in reaching marketing decisions with respect to their products. As far as these producers were concerned, their only serious competition was with those companies in the industry who manufactured household steel wool. Little or no attention was paid to producers of materials other than steel wool. Indeed, G.F. itself recognized that competition offered by nonsteel wool products is at best "indirect."

Prior to acquiring S.O.S., G.F. made a detailed study of the soap pad business and its competition. In part this study stated:

> "* * * Brillo, the only significant direct competition, has been in the field for years without retarding S.O.S. We are unaware of any new inventions or products which would jeopardize the S.O.S. market. S.O.S., through Tuffy, is setting up its own *indirect* competition.[10] Other *indirect* competition includes abrasive sponges and bronze or stainless steel scouring pads. S.O.S. has an opportunity to introduce such items as new products under its own label." (Emphasis supplied.)

In light of the foregoing report, it is difficult to understand how appellant can seriously expect us to believe that

[10] "Tuffy" is appellant's own plastic product, and according to a study prepared for appellant in 1962 it is by far the largest selling of all the nonsteel wool cleaning devices that appellant seeks to include in the relevant market.

nonsteel wool devices, including Tuffy, are directly competitive with household steel wool products. Our incredulity is heightened by the fact that the majority of products which appellant now contends to be close substitutes were in existence and on the market at the time of G.F.'s preacquisition study. As stated by the Commission:

> "* * * [I]f [appellant] and the other steel wool soap pad manufacturers regard themselves as a separate market, then it is this market in which the impact of [appellant's] acquisition must be judged. It cannot be said that the existence and conduct of other manufacturers outside the market must be considered where the soap pad manufacturers themselves do not take these substitute product manufacturers into account in their own pricing and marketing decisions." General Food Corp., — F.T.C. — (Dkt. 8600, 1966).

The Commission further found that steel wool pads have *peculiar characteristics and uses.* Testimony and exhibits relating to the physical composition, operational characteristics, and stated uses for household steel wool substantiate this finding. Nonsteel wool products assume variant forms bearing little resemblance to steel wool and their compositions range from plastic, to copper, to abrasive-surface sponges. But appellant argues that these products are functionally similar to the steel wool soap pad. An attempt is made to support this argument by pointing to advertising claims made by some of the allegedly direct competitors. The attempt is unsuccessful. Advertising puffs will not be considered by this court as evidence of that which could not be proved below. We prefer to place reliance on testimony given by both the former general manager of appellant's Kool-Aid Division and the preacquisition president of S.O.S. These gentlemen stated that, to the best of their knowledge, there was no available device that would perform as well as the steel wool soap pad for the purposes advertised on the S.O.S. box.

Appendix A

Appellant's argument respecting the alleged similarity between household steel wool and the synthetic devices is further attenuated by G.F.'s aforementioned pre-acquisition report. This report noted:

> "S.O.S. in the kitchen is used primarily for scouring pots, pans, stoves, etc., while Tuffy is used much as a dishrag is used."

Surely, appellant does not expect us to find that "Tuffy," one of the largest selling synthetic products, has the same characteristics and uses as the steel wool soap pad when its own officials admitted that it was not manufactured or used for scouring pots and pans, but primarily as a dishwashing aid. These admissions, together with related facts found by the Commission, support the conclusion that household steel wool has peculiar characteristics and uses.

Adhering to the *Brown Shoe* guidelines, the Commission next compared the retail sales price of steel wool soap pads with the prices of allegedly competing products. After carefully computing and contrasting the prices of all the products in both categories, the Commission concluded that *household steel wool products are sold at distinct prices.* Appellant strongly objects to this conclusion on the ground that many of the nonsteel wool devices (13 of which generally sell for 29 cents and one of which usually sells for 27 cents) are comparable to those of Brillo and S.O.S. soap pads (approximately 28 cents per package). At first glance this argument appears to have merit. But further analysis persuades us that the Commission's focus on the selling price of individual steel wool soap pads was the only practicable way in which to approach the problem. The Commission found that prices of steel wool soap pads range between 1.4 cents to 2.8 cents per pad, while nonsteel wool products are sold between 6 cents and 29 cents per item. Appellant, however, urges that the proper test is one of comparing the life expectancy of a 28 cent package of steel wool soap pads with the longevity of a similarly priced

package of a nonsteel wool product. We agree with the Commission's view that the very necessity of resorting to such estimates in order to compare prices tends, by itself, to demonstrate the distinctiveness of the prices of the household steel wool products.

Almost no evidence was introduced on behalf of the Commission concerning consumer sensitivity to price changes. There is, however, sufficient evidence to support the finding that the *prices of household steel wool products display no sensitivity to prices of nonsteel products.* Without exception, the smaller steel wool manufacturers testified that they disregarded the pricing structure of the nonsteel wool devices. These manufacturers stated that they looked only to prices established by S.O.S. and Brillo when making pricing decisions. The former general manager of G.F.'s S.O.S. operation stated that he and other high level executives paid little attention to the sales volume and pricing structure of the nonsteel wool products. And, not surprisingly, the present general manager, when questioned closely, evidenced a general lack of knowledge of the prices of many of these allegedly competing products.

Finally, the Commission found that the equipment used for the production of steel wool is distinct from, and lacks any similarity to, the facilities required to manufacture the other cleaning devices that appellant contends should be included in the relevant market. It seems to us that this finding is self-evident and unimpeachable. Steel wool producing machinery is not available on the open market, but must be custom made to specification. It cannot practically be used to manufacture other products. To argue that S.O.S. did not utilize *unique production facilities* would be to ignore the obvious.

To summarize, we think that there is substantial evidence in the record to support the Commission's finding that the relevant product market is household steel wool. It has been shown that household steel wool products constitute

an economically significant market and that this market is sufficiently inclusive to be meaningful in terms of trade realities. See Crown Zellerback Corp. v. Federal Trade Commission, 296 F.2d 800, 811 (C.A.9, 1961), cert. denied, 370 U.S. 937 (1962). Some of the more significant trade realities in this case include the existence of unique steel wool producing machinery, industry recognition of the household steel wool submarket as a separate economic entity, the peculiar characteristics and uses of household steel wool, a distinct pricing structure, and the lack of sensitivity to prices of nonsteel products.

The Commission's delineation of the relevant market rested upon a carefully reasoned review of the applicable legal precedents and a thorough analysis of the relevant facts. Much of the evidence supporting the Commission's determination consists of studies and analysis made by G.F.'s own management in evaluating the possibility of profitably acquiring S.O.S. Testimony of G.F.'s officials as to how they actually operated the S.O.S. division and whom they regarded as their real competition lends added weight to the finding that household steel wool is the relevant product market for purposes of this case.

We therefore reject appellant's contention that nonsteel wool cleaning devices constitute part of the relevant market and hold that there is substantial evidence in the record to support the Commission's finding that household steel wool constitutes a relevant market within the meaning of Section 7.

II.

The essential issue remains whether the Commission had substantial evidence to support its finding that the acquisition of S.O.S. by G.F. would have a substantial anticompetitive effect in the household steel wool market. In evaluating the record before us, we are mindful that the facts must show more than a "mere possibility" of an

anticompetitive effect. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 598 (1957). However, the language of § 7 clearly indicates that the Commission need not show that competition has been, or is being restrained, but only that "* * * the effect of such acquisition *may be* substantially to lessen competition, or to tend to create a monopoly." (Emphasis supplied.) As summarized by the Supreme Court in *Clorox:*

> "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. * * * The section can deal only with probabilities, not with certainties. * * * And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." 386 U.S. at 577.

On the basis of our review of the record, the Commission's opinion, and the recent holding in *Clorox,* supra, we will affirm the Commission's order.

In general business parlance, the instant acquisition would be classified as a conglomerate merger. A merger is considered conglomerate when the relationship of the merging companies before the merger was not one of buyer and seller (a vertical merger) or direct competitor (horizontal merger). The fact that a given merger is of a conglomerate nature has no effect per se on the antitrust consequences of the union: "All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."

Clorox at 577. Indeed, one of the main purposes of the 1950 amendment of § 7 was to make clear that the section was not applicable only to horizontal mergers, but "to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly." H. Rep. No. 1191, 81st Cong., 1st Sess. II (1949).

However, while a merger is not free of antitrust consequences because it is conglomerate, few such mergers have been contested by the government. Challenges to the kind of acquisition involved in this case lie in a "comparatively new field of economic adjudication," *Clorox* at 582 (Justice Harlan concurring), a field troubling to both courts and the Commission.

The problem in analyzing conglomerate mergers is that the effect of such a merger on the relevant market is not so readily apparent as is the case with vertical and horizontal mergers. In part, this problem arises from the fact that the term "conglomerate merger" encompasses such a variety of combinations. As suggested by then-professor Turner, the class of mergers included in this term

> "* * * ranges from the pure conglomerate, in which there are no discernible economic relationships between the businesses of the acquiring and the acquired firm, through a variety of what may be called mixed conglomerates, involving horizontal or vertical economic relationships * * *. Mixed conglomerates include acquisition of a firm producing the same product as the acquirer but selling it in a different geographic market, and acquisition of a company manufacturing a different product which is nevertheless related to a product or products of the acquiring firm because it can be produced with much the same facilities, sold through the same distribution channels, or made a part of the same research and development efforts." Turner, Con-

glomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1315 (1965).

While antitrust consequences might attach to a "pure" conglomerate merger, it is more likely that "mixed" conglomerates with their attendant horizontal or vertical relationships will come under attack as involving proscribed alterations in the structure of a given relevant market. The instant case is an example of a mixed conglomerate merger in that the acquired product line, S.O.S. soap pads, "fits" quite closely into the overall marketing program utilized by G.F. The Commission labeled this merger a "product extension merger" which is to say a " * * * merger that may enable significant integration in the production, distribution or marketing activities of the merging firms. " We quite agree with this characterization of the instant merger because, as found by the Commission, the acquired product line was easily integrated into the marketing program employed by G.F. for its packaged food products: common to the marketing of all these products are high-consumer-oriented advertising budgets; the same distributional outlets, primarily grocery stores and supermarkets; and the same ultimate consumer group, the housewife.

Agreeing as we do with this characterization of the merger, it is still necessary to determine whether the Commission had substantial evidence to support its prediction that the merger would probably substantially lessen competition. This determination is necessary because we do not read *Clorox* as proscribing, per se, all mergers labeled "product extension mergers."

As summarized by the Commission, the conclusion that G.F.'s acquisition of S.O.S. would in fact substantially lessen competition in the steel wool soap pad market was based on its

> "* * * finding that respondent's acquisition of S.O.S. has raised to virtually insurmountable heights entry

barriers which were already high, that the presence of General Foods in the market has changed the steel wool pad market which prior to the merger consisted of two substantially equal-sized companies and several smaller firms to one in which S.O.S. is now dominant, and finally that the substitution of General Foods for S.O.S. will depress rather than enhance the competitive vitality of the market and will paralyze any incentive to compete which might otherwise have existed. The fact that these high entry barriers to potential entrants and the impairment of the competitive vitality of the market arises in part because of the impact which General Foods' advertising, promotional and distributional resources had on potential and actual competitors in this market did not make its acquisition any less anticompetitive."

Although G.F. asserts that its acquisition of S.O.S. did not raise entry barriers, the Commission could reasonably conclude the contrary on the basis of the record before it. The Commission found that before the merger, the steel soap pad market was highly concentrated, and although the products of the competitors were functionally identical, consumer preference for the S.O.S. and Brillo products had been generated through extensive advertising and a long history of industry dominance. Thus the smaller companies producing less well-known brands and potential producers of new brands could not make significant market penetrations without engaging in heavy expenditures for advertising and promotions. After the merger of S.O.S. and G.F., the existing competitors and such potential competitors as existed faced an even more formidable opponent. G.F. was able to advertise and promote S.O.S. less expensively than the pre-merger S.O.S. Company, especially because of the television discounts available to G.F. Moreover, after the merger, S.O.S. could and did induce potential customers to purchase its soap pads by offering them dis-

counts based on pooled purchases from various divisions of G.F. The Commission also reasonably concluded that G.F. was in a position vis-a-vis the retailers that made it highly likely that G.F. would be able to obtain advantages in the display or marketing of S.O.S. which were not available to the pre-merger company, nor then available to S.O.S.' competitors. These factors are adequate to support the Commission's finding that factual and psychological barriers to entry were substantially heightened by this merger.

The Commission also found that the merger had an adverse impact on the structure of the soap pad industry. Comparing the situation with that presented in *Clorox,* the Commission found that the impact of G.F.'s acquisition of S.O.S. was of greater competitive significance than Procter & Gamble's acquisition of Clorox since G.F.'s entrance into the soap pad market had a more pronounced effect on the competitive structure of the industry. In *Clorox,* Procter & Gamble acquired the overwhelmingly dominant company in the liquid bleach industry, the only nationwide seller that accounted for almost half of the national sales and whose nearest competitor accounted for only 15% of the market. Highly significant in *Clorox* was the fact that the Commission found that Procter & Gamble was the most likely prospective entrant and exerted an influence on the market as a potential competitor.

The Commission found that while the merger in *Clorox* rendered the dominant company in an industry even more powerful, G.F.'s acquisition of S.O.S. "eliminated the competitive balance between S.O.S. and Brillo," the two dominant members of the industry, and left S.O.S. with "decisive competitive advantages over Brillo." This disproportionate strength would contribute to and increase concentration in the industry. Though not well articulated, there is merit to the Commission's finding. While it is not the aim of antitrust policy to merely preserve "competitive balance" per se, it assuredly is the aim of such policy to

preserve whatever competition exists in a given industry, even if such competition be of an oligopolistic nature.

G.F. also challenges the Commission's findings as inconsistent with the post-acquisition history of the merger, asserting that the effect of the merger was really to revitalize the then-stagnant competition between S.O.S. and Brillo. As pointed out by appellant, post-acquisition evidence shows that S.O.S. lost ground to Brillo during the initial period following the merger. Subsequently, through an aggressive, imaginative campaign directed especially against Brillo's dominant position in the lucrative New York market, S.O.S. regained its position and, at the time the record closed below, had increased substantially its share of the market over its pre-merger proportion. The problem here is that the post-acquisition evidence is inconclusive and susceptible of diverse inferences, including inferences supporting the Commission's position. Indeed, the post-acquisition history indicates that Brillo has merged with the Purex Corporation, Ltd. While the Commission did not attempt to evaluate the effect that this merger would have in the steel soap pad market, it did note that the likelihood that a given merger will trigger other mergers and give impetus to further concentration is a relevant factor in assessing the anticompetitive effect of that merger. Brown Shoe Co. v. United States, 370 U.S. 294, 343-44 (1962).

G.F. has also argued that one of the central aspects of the *Clorox* case, the elimination of the acquiring firm as a potential competitor, is entirely missing in this case, and that the record does not support the finding that the market structure of the steel wool soap pad industry was drastically altered through any loss of potential competition. It is true that G.F. was not a potential competitor lurking on the fringe of the soap pad market and exerting an effect on the actions of the actual competitors. However, we do not read *Clorox* as holding that "product ex-

tension'' mergers must involve the elimination of this type of potential competition to run afoul of this type [sic] of the Clayton Act.

Moreover, the Commission could reasonably conclude that the potential competition was adversely affected by G.F.'s entrance into the market through the acquisition of S.O.S. because the entry of such a large, well-financed, aggressive competitor would necessarily hamper whatever effect potential competition had in the pre-merger market. This result follows because the threat of entrance into a given market by potential competitors is reduced to the extent that entry barriers are raised. Thus the Commission's finding that potential competition was reduced by the instant merger is based on its finding that the substitution of G.F. for the smaller S.O.S. Company increased the difficulty of entering the market, and the reduction of potential competition was a predictable consequence.

The Commission could reasonably conclude that the entry of G.F. would have a depressing effect on the quality of competition in the market. As in *Clorox*, the degree of market power enjoyed by G.F., including the power to take retaliatory action against any aggressive competition by smaller competitors, made it unlikely [sic] that the market would be come an even more rigid oligopoly. It is no answer to contend that the market was oligopolistic before the entrance of G.F. because the Commission could reasonably conclude that under G.F.'s eventual dominance, the market would become even less competitive. Moreover, the immediate post-acquisition flurry of competition between Brillo and S.O.S.—which apparently led to S.O.S.' eventual emergence with a greater market share, and the merger of Brillo with Purex—certainly does not compel the conclusion that the market will become competitive.

Thus, we conclude that the Commission was justified in finding that G.F.'s acquisition of the S.O.S. Company would substantially lessen competition in the steel wool

soap pad market, and in adopting the order entered by the hearing examiner requiring G.F. to divest itself of the S.O.S. assets found to have been acquired in violation of § 7. United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 328-31 (1961).

The order of the Commission will be affirmed and enforced. 15 U.S.C. § 21(c) (1964).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15,910

GENERAL FOODS CORPORATION, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Present: STALEY, *Chief Judge,* HASTIE, *Circuit Judge,* and SHERIDAN, *District Judge.*

Final Decree Affirming and Enforcing Order of the Federal Trade Commission

Petitioner, General Foods Corporation, having filed in this Court on May 12, 1966, a petition to review and set aside an order issued against it on March 11, 1966, by the Federal Trade Commission, respondent herein; and respondent having thereafter certified and filed in this Court a list of all documents, transcripts of testimony, exhibits and other material comprising the record in the proceeding upon which the order was based; and the matter having been heard by this Court on briefs and oral argument on June 6, 1967; and this Court having rendered its decision and issued its opinion on November 9, 1967, affirming and enforcing the Commission's order in its entirety:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioner be, and it hereby is, com-

manded forthwith to obey said order and to comply therewith.

By the Court.

.....

WILLIAM H. HASTIE
United States Circuit Judge

Entered: December 21, 1967

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of GENERAL FOODS CORPORATION, a corporation.	Docket No. 8600

Final Order

This matter having been heard by the Commission on an appeal by respondent from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeal should be denied, that the initial decision, as supplemented and modified to conform to the views expressed in the accompanying opinion, should be adopted as the decision of the Commission, and that the order issued by the hearing examiner should be adopted as the order of the Commission:

IT IS ORDERED that the initial decision, as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that the order issued by the hearing examiner be, and it hereby is, adopted as the order of the Commission.

IT IS FURTHER ORDERED that the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission, without the concurrence of Commissioner MacIntyre. Commissioner Elman dissented and has filed a dissenting opinion.

SEAL

/s/ JOSEPH W. SHEA
Joseph W. Shea
Secretary

ISSUED: March 11, 1966

ATTACHED ARE:

(1) Opinion of the Commission by Commissioner Jones

(2) Dissenting opinion by Commissioner Elman

Opinion and Order

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of GENERAL FOODS CORPORATION, a corporation.	Docket No. 8600

Opinion of the Commission

By Jones, Commissioner:

On September 30, 1963, complaint issued against respondent General Foods Corporation (General Foods) charging it with violation of Section 7 of the Clayton Act by reason of its acquisition on December 31, 1957, of the assets of The S.O.S. Company, Inc. (S.O.S.). The complaint alleged that the effect of the acquisition "has been, or may be, substantially to lessen competition or tend to create a monopoly in the manufacture, distribution and sale of household steel wool * * * throughout the United States * * *."

On December 18, 1964, the hearing examiner filed his initial decision. The hearing examiner concluded that Gen-

eral Foods' acquisition of S.O.S. had the tendency substantially to lessen competition and consequently violated Section 7 of the Clayton Act. Respondent has appealed and urges, first, that the examiner erred in defining the relevant product market as consisting solely of household steel wool products and excluding from this definition some 40 other cleaning devices; second, respondent contends that this product extension merger was totally dissimilar in type and effect on competition to Procter & Gamble's acquisition of The Clorox Company, held illegal by this Commission in 1963 (*The Procter & Gamble Co.*, Docket 6901), and indeed that respondent's acquisition of S.O.S., rather than diminishing competition, has brought much-needed competition in an industry which has been characterized by peaceful competitive co-existence. Accordingly, respondent contends that the complaint against it should be dismissed. We will consider these arguments seriatim.

I

The Relevant Product Market[1]

The examiner found that the appropriate line of commerce or product market for measuring the effect of the acquisition is household steel wool. This product market consists primarily of soap-impregnated steel wool pads, but also includes plain household steel wool pads with or without separate pieces of soap. Respondent, condemning this market as "artificial," contends that, in addition to steel wool pads, approximately 40 other kitchen cleaning devices, composed of such materials as plastic, cellulose and metals other than steel, should be included in the market. Two of these

[1]The hearing examiner found, and both parties agree, that the relevant geographic market is the entire United States.

devices are impregnated with soap and the remainder are not.[2]

A. The Criteria for Determining the Appropriate Product Market

The standards to be applied in delineating a line of commerce do not depend upon the form of the merger but on the realities of the market in which the merged companies operate.[3]

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[2]The examiner classified the devices which are claimed by the respondent to be part of the relevant market as follows: "(a) 14 are steel wool pads which counsel in support of the complaint agree are properly includable in the 'line of commerce,' whether soap-impregnated or not. (b) 13 items are plastic mesh balls or pads, some of which have a sponge inside the ball or mesh, but none of which are soap-impregnated. Respondent's product 'Tuffy' is in this group. (c) 14 items are basically plastic or cellulose sponges with an abrasive surface joined to one side of the sponge. Minnesota Mining and Manufacturing Company's 'Rescue' is in this group and is soap-impregnated. (d) 7 items are pads of metal mesh made of metal other than steel wool, but none of which are soap-impregnated. (e) 2 items are fiber dish cloths coated with an abrasive substance, neither of which is soap-impregnated" (I.D., par. 15).

[3]Cases to date involving "conglomerate" mergers have used the same tests for defining the relevant market and measuring the effects of such mergers as those applied to test the effects of horizontal and veritical mergers; see *Consolidated Foods Corp.* (Dkt. 7000, 1962); rev. 329 F. 2d 623 (7th Cir. 1964); rev. 380 U. S. 592 (1965); Reynolds Metals Co. v. F. T. C., 309 F. 2d 223 (D. C. Cir. 1962); *Union Carbide Corp.*, 59 F. T. C. 614, 642-3, 658 (Dkt. 6826, 1961); and the *Procter & Gamble Co. (Clorox)* (Dkt. 6901, 1963). Legal commentators and economists who have discussed "conglomerate" mergers have similarly not suggested the application of any different tests to define the relevant product market in such mergers. See for example, Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harvard Law Review 1313 (1965); Clark, "Conglomerate Mergers and Section 7 of the Clayton Act," 36 Notre Dame Lawyer 255 (1961); Edwards, "Conglomerate Bigness as a Source of Power", Business Concentration and Price Policy 331 (1955); Stocking, "Conglomerate Bigness—Comment," Business Concentration and Price Policy 352 (1955); Blair, "The Conglomerate Merger in Economics and Law," 46 Georgetown Law Journal 672 (1958); Adelman, "Antitrust Problems: The Anti-Merger Act 1950-60," American Economic Association at 236; Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N. Carolina Law Review 511 (1964); Comment, "Conglomerate Mergers Under Section 7 of the Clayton Act," 72 Yale Law Journal 1265, 1270 (1963).

The relevant market is the "area of effective competition" within which the respondent operates, *Standard Oil Company of California* v. *United States*, 337 U. S. 293, 300, n. 5 (1949). "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 303 (D. Mass., 1953); aff'd *per curiam*, 347 U. S. 521 (1954). The boundaries of the market "must be drawn with sufficient breadth to * * * recognize competition where, in fact, competition exists." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 326 (1962). The product line must be "sufficiently inclusive to be meaningful in terms of trade realities". *Crown Zellerbach* v. *F. T. C.*, 296 F. 2d 800, 811 (9th Cir. 1961). *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 357 (1963).

The fact that different products may in some sense be competitive with each other is not sufficient to place them in the same market if by themselves they constitute distinct product lines. In *United States* v. *Aluminum Co. of America (Alcoa-Rome Cable)*, 377 U. S. 271, 275 (1964), insulated aluminum conductor was considered a separate market although the Court conceded that there was sufficient competition between this product and its copper counterpart to justify grouping these two products in a single product market. In *Union Carbide Corp.*, 59 F. T. C. 614, 655 (Dkt. 6826, 1961), the Commission noted that "there is and will continue to be competition between polyethylene film and other flexible packaging materials" but nonetheless place them in separate lines of commerce. Competing products have also been placed in separate product markets in a number of other cases, including *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 891 (S. D. N. Y. 1963) (where low sudsing detergents and high sudsing detergents were placed in separate markets despite the "direct competition" between them), and *United States* v. *Aluminum Co. of America, et al.*, 233 F. Supp. 718 (E. D. Mo. 1964) (where

a market was found for aluminum curtain wall despite the competition between it and other types of building materials). See also *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 356 (1963); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 593 (1958); *Crown Zellerbach Corp.* v. *F. T. C.*, 296 F. 2d 800, 814, 815 (1961); *Reynolds Metals Co.* v. *F. T. C.*, 309 F. 2d 223, 229 (D. C. Cir. 1962) and *United States* v. *Pennzoil Co.*, 1966 Trade Cases Par. 71,659 (W. D. Pa. 1966).

Similarly, the fact that "substitute" products are available does not compel the conclusion that they be placed in the relevant market. In *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957) the market was restricted to "automotive fabrics and finishes" even though the same or similar products were utilized in other industries. In *Union Carbide Corporation, supra,* the Commission acknowledged that there were "adequate substitutes" for polyethylene film as a flexible packaging material but nevertheless excluded such substitutes from the relevant market. See also *Consolidated Foods Corp., supra* (where dehydrated onion and garlic were held to comprise a separate market, even though a broader market could presumably have been considered including fresh onion and garlic, as respondent therein contended); *Reynolds Metals Co.* v. *F. T. C.*, 309 F. 2d 223 (D. C. Cir. 1962) (where the market was narrowly defined to be decorative aluminum foil sold to the florist trade, as distinct from aluminum decorative foil, aluminum household foil and perhaps even wrapping paper); and *Clorox, supra,* (where household dried bleach was shown to be available as a substitute product for certain purposes but was nevertheless excluded from the market, which was confined to household liquid bleach).

The applicable legal test for defining a product market for the purposes of determining the effect upon competition of a merger or acquisition was most recently reaffirmed in the *Brown Shoe* opinion, *supra* at page 325:

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed."[4]

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[4]The criteria enumerated in *Brown Shoe* did not spring full-blown from the Supreme Court but had been developed in the preceding cases decided under Section 7 subsequent to its amendment in 1950. For example, (1) industry and public recognition of the market was regarded as a significant factor in defining the market in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958) and *A. G. Spalding & Bros., Inc.*, 56 F. T. C. 1125, 1160 (Dkt. 6478, 1960), aff'd. 301 F. 2d 585 (3rd Cir. 1962); (2) the "peculiar characteristics and uses" of automotive fabrics and finishes was the sole basis for the finding of the market in *United States* v. *E. I. du Pont de Nemours & Co.* (*General Motors*), 353 U. S. 586, 593-95 (1957); (3) the distinct prices of two product lines was one of the factors cited by the Commission in the *Spalding* and *Union Carbide* cases in placing such products in separate markets; (4) price sensitivity was one of the tests applied in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524, 530 (2nd Cir. 1958) and; *Union Carbide*, 59 F. T. C. 614 (Dkt. 6825, 1961).

While conceding the validity of the tests enumerated in the *Brown Shoe* case, respondent nevertheless argues that the relevant market must be defined to include all products which could in any sense be regarded as competitive. In support of this view respondent relies heavily on the Supreme Court decision in *United States* v. *Continental Can,* 378 U. S. 441 (1964), decided three weeks after *Alcoa-Rome Cable, supra.* In *Alcoa,* the merger challenged was between two aluminum conductor producers and defendant argued that its acquisition did not have the prohibited impact on competition because of the existence of substitute products (i.e., insulated copper conductors) which therefore required a broader market definition comprising all competitive products. The Court rejected this argument, finding that whatever the broader market might be, a meaningful product also existed consisting of aluminum conductors alone.

In *Continental Can,* the Court was confronted with just the reverse of the situation in *Alcoa.* In *Continental Can,* the acquiring company, Continental, produced metal containers and the acquired company produced glass containers. Thus, the issue before the Court was whether a broader market encompassing both products was meaningful; the Court was not concerned with the question as to whether a more limited product market also existed. The Court held that metal and glass containers were in the same product market for the purposes of considering the effects of the acquisition, even though the Court considered the products of the two companies to be in "separate industries" and to comprise distinct "product markets". The market defined by the Court in *Continental Can* was that delimited by the "outer boundaries" referred to in the *Brown Shoe* opinion; but the Court took pains to point out that its finding with respect to this broader market did not preclude the finding

of narrower submarkets within the more comprehensive market:

> "* * * That there may be a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass together, for 'within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.' *Brown Shoe Co.* v. *United States,* 370 U. S., at 325" (378 U. S. 457-58).

In short, the test of the relevant market is whether a given line of products constitutes an economically significant market and whether that market is "sufficiently inclusive to be meaningful in terms of trade realities". *Crown Zellerbach Co.* v. *F. T. C.,* 296 F. 2d *supra* at 811. In defining the market it is immaterial that there may be other broader or narrower markets in which the companies are also operating.[5]

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[5]Respondent argues that "whatever the technical definition of the product market no rational evaluation of present or future competitive conditions can be made without taking non-steel scouring devices into account" (Respondent's Brief on Appeal, page 26). It is clear, however, under Section 7 of the Clayton Act, that once the appropriate product market for determining the effect of the merger has been defined, the only consideration which is relevant is whether or not there is a reasonable probability that competition in that market may be substantially lessened. "If such a probability is found to exist the merger is proscribed." *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 325 (1962). Consequently, we reject respondent's contention that whatever the definition of the market may be we must nevertheless still consider the broader cleaning device market in our assessment of the competitive impact of respondent's merger.

B. Application of the *Brown Shoe* Criteria To Define the Relevant Product Market

Although seven separate criteria are suggested in *Brown Shoe* for use in defining the market, the opinion did not indicate that all of them must necessarily be considered in each case. We find the following factors are particularly significant in this case:

1. Industry or public recognition of the submarket as a separate economic entity[6]

The producers of household steel wool recognized that the product, which they frequently referred to as a "soap pad", constituted a distinct market and looked only to the steel wool products manufactured by each other in setting prices and making marketing decisions. Thus respondent, in its pre-acquisition report, considered only the steel wool products of S.O.S. and Brillo in making its determination that S.O.S. had "60 per cent of the national dollar volume" (CX 5(b)).

Furthermore, in separate studies prepared for respondent by Market Facts, Inc., in 1959 (RX 12), by National Family Opinion, Inc. in 1962 (RX 14) and by Foote, Cone and Belding in 1963 (RX 15), the market was again referred to as the "soap pad market," which included steel wool products and excluded other cleaning devices. Other non-steel wool cleaning devices were considered in the 1963 Foote, Cone and Belding report, but they were consistently referred to as constituting a different market separate and distinct from steel wool pads. Even for the purpose of this litigation counsel for respondent was unable to produce any study of a market including both steel wool and non-steel wool devices.

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[6]Respondent misstates this test as " 'industry and public recognition' of the presence or absence of competition between the products under consideration" (Respondent's Brief on Appeal, page 17).

It is clear that the only competition which respondent seriously considered in the advertising, packaging and production of its product was that offered by Brillo household soap-impregnated steel wool pads. Thus, in its pre-acquisition study of S.O.S., respondent made a distinction between the "direct competition" between S.O.S. and Brillo and the "indirect competition" between S.O.S. and such articles as "abrasive sponges and bronze or stainless steel scouring pads" (CX 7, p. 10). After its acquisition of S.O.S., respondent continued its preoccupation with the sales of S.O.S. as compared with those of Brillo and did not concern itself with the market roles of the cleaning devices which it now claims are part of the market. Thus after the acquisition respondent revamped the advertising and packaging of S.O.S. pads in an attempt to demonstrate or convey the impression that the S.O.S. pad rusted less and "actually carried more soap than the average Brillo pad" (Tr. 1079). A change in the color of the soap pad from red to blue was prompted by studies which "had indicated that the reddish soap used by both Brillo and S.O.S. reminded the housewife of rust (Respondent's Brief on Appeal, page 11). Moreover, when respondent launched an onslaught on the New York market in 1959, the only other product which it took into consideration was the Brillo soap pad (RX's 12, 17, 42; Tr. 1089).

One of the products now claimed by respondent's counsel to be directly "competitive" and to have been artificially excluded from the relevant product market is respondent's own plastic device, "Tuffy." This must come as a surprise to respondent's own officials, who, as shown by the record, had apparently never considered "Tuffy" to be directly competitive with the S.O.S. soap pads. In a report prepared for the board of directors prior to the acquisition it was stated that "Tuffy and S.O.S. are complementary rather than competitive." (CX 5(b)). In General Foods' acquisition study of S.O.S., Tuffy was stated to be part of the "indirect com-

petition" with S.O.S. At the hearing, a former general manager and the present general manager of the Kool-Aid Division of General Foods which now includes S.O.S. pads, testified that Tuffy did not compete with "S.O.S." (Tr. 626, 761-762).

Respondent's own general manager up to the time of this litigation had been totally unaware of even the existence of many of the cleaning devices now alleged by respondent to be part of the relevant product market and directly competitive with steel wool pads (Tr. 791-795, 816-817).

Finally, it should be noted that the other steel wool pad manufacturers regard themselves as constituting a separate and distinct industry. Thus, the president of Durawool Company testifying at the hearing drew a careful distinction between what he characterized as "the new products" (meaning non-steel wool products) and those "in the industry" (consisting of steel wool producers) (Tr. 875). The president of Demcorp testified that the non-steel wool devices did not offer his product any "direct competition" and that he did not "take the prices of the other products into consideration when he set his price" (Tr. 974). The president of Alloy Metal Wool Products declared that his only competitors were Brillo, S.O.S., Durawool and American Steel Wool Company, and that he had not considered the non-steel wool devices to be "competitive items" (Tr. 897-898).

It is obvious that if respondent and the other steel wool soap pad manufacturers regard themselves as a separate market, then it is this market in which the impact of respondent's acquisition must be judged. It cannot be said that the existence and conduct of other manufacturers outside this market must be considered where the soap pad manufacturers themselves do not take these substitute product manufacturers into account in their own pricing and marketing decisions.

2. The product's peculiar characteristics and uses

The steel wool pad is composed of triangular-shaped steel strands with three cutting edges. When used, a number of the edges are pressed down, and the pad cleans the surface in a manner similar to a knife or a razor blade. The soap with which a soap pad is impregnated lubricates, inhibits scratching, facilitates polishing, and removes grease and grime (Tr. 432, 629, 893, 939, 978-979). The steel wool pad is a soft and pliable product which is able to reach crevices and corners (Tr. 844).

The primary use of steel wool pads is the scouring of pots and pans; the general manager of respondent's Kool-Aid Division estimated on the pad usage basis that this use constitutes "at least 80 percent of the total volume" (Tr. 759). Other uses, described as peripheral, are cleaning white-wall tires, floors, walls, stoves, aluminum doors and windows and barbecue grills.

Physically, the non-steel wool cleaning devices which respondent's counsel argues should be included in the relevant market are unquestionably distinct. They are composed of a variety of substances such as plastic, copper and abrasive surface sponges, none of which closely resembles steel wool. Furthermore, only two of the non-steel wool devices, unlike the overwhelming number of steel wool pads produced, contain soap.

The examiner found that steel wool pads "made a particularly effective abrasive" (I. D. par. 18) and that none of the other devices "are able to perform the wide range of household cleaning jobs as well as household steel wool" (I. D. par. 20). Respondent's counsel accuse the examiner of "substituting his own *personal* judgment for that of the market place with respect to the *quality* of the different scouring devices involved" and further disparages the ex-

aminer's finding by declaring that his "personal quality judgment is without evidentiary support" (Respondent's Brief on Appeal, page 19).

We find, however, that the examiner's finding, which coincides with the conclusions of S.O.S.' and respondent's own officials who testified at the hearing, is amply supported by the record, and we note that the only evidence which respondent offered to contradict this evidence consisted of advertising claims made for some of the purportedly competitive products. A former general manager of the respondent's Kool-Aid Division testified flatly that "For the uses that S.O.S. was advertised for and pictured on the box, it was better than other products" (Tr. 624). He further testified that respondent had tested a number of other cleaning devices and found that none of them could "perform as well as the S.O.S. steel wool soap pad * * * for the purposes that we advertise on the box" (Tr. 626). The president of S.O.S. prior to the acquisition testified that his company had "found there was nothing in [its] opinion that was as good as steel wool abrasive" (Tr. 429-30) and that in his opinion "soap pads are the best cleanser I know of" (Tr. 431). Moreover, respondent's own plastic device, "Tuffy", which, according to a study prepared for respondent in 1962 (RX 14(m)), is by far the largest of all of the non-steel wool cleaning devices which respondent seeks to include in the relevant market, was not devised or used for scouring pots and pans, according to respondent's own officials who testified at the hearing (Tr. 626, 761) as well as respondent's pre-acquisition report, in which it had stated:

> "S.O.S. in the kitchen is used primarily for scouring pots, pans, stoves, etc., while Tuffy is used much as a dish rag is used" (CX 5(b)).

Also, at least four other plastic devices, "Dobie," "Handy Mandy," "Polly Puff," and "Reddy", which respondent's counsel claim should be included in the market, do not even claim in their advertisements that their products can be used for scouring pots and pans. (See respondent's proposed findings, pp. 148, 152, 155 and 156.)

Accordingly, we find that household steel wool has unique physical characteristics; that many of the allegedly competitive devices are not even claimed to perform all of the household chores performed by steel wool, including its principal task, scouring pots and pans; and that those as to which such claims are made are substantially inferior in the performance of such tasks.

3. Distinct prices

The unit sales prices of steel wool soap pads and the other cleaning devices claimed by respondents to be part of the same market differ markedly from each other. (See Appendix B, Table IV.) Steel wool soap pads sell at a range of 1.4 cents to 2.8 cents (the latter representing the price at which S.O.S. and Brillo pads normally sell[7]), while the prices per item of the non-steel wool devices range from 6 cents to 29 cents. Respondent emphasizes the fact that the prices per package of certain of the non-steel wool devices (13 of which sell for 29 cents and one of which sells for 27 cents) are comparable to those of Brillo and S.O.S. pads (28 cents per package). However, the number of units per package varies so widely as to render the package price meaningless in any comparison of prices between steel wool and non-steel wool devices. For example, one "Scotch Brite" pad separately packaged sells for 29 cents, while the allegedly comparable "package" of Brillo or S.O.S. soap pads

[7]Brillo also has a special purpose Brillo Whitewall Tire pad which sells for 7.3 cents.

which sells for 28 cents per package contains ten pads. Similar examples could be multiplied. Moreover, in considering respondent's argument it should be noted that in the case of many of the scouring devices which respondent claims should be included in the relevant market (8 of which sell for less than 20 cents) even the package prices bear no relationship of any kind to the prices of the dominant steel wool brands.

It is clear that while the prices of steel wool pads are substantially identical, they bear little or no relationship to the prices of non-steel wool cleaning devices. The only way in which prices could be compared would be to make estimates of the useful life of the 29-cent single pad, for example, as compared with the 10 S.O.S. pads selling for 28 cents. Surely, the need to make such a computation in order to compare prices almost by itself demonstrates the distinctiveness of the steel wool products as compared with the other cleaning devices which respondent urges be included in the relevant market.

4. Sensitivity to price changes

Although there is no direct evidence as to consumer sensitivity to price changes, the record does make it clear that respondent and the other steel wool manufacturers paid little or no attention to the prices of the non-steel wool devices. The former manager of respondent's Kool-Aid Division testified that respondent "didn't pay much attention to the pricing structure of these small products" in setting its prices (Tr. 626). The present general manager of this division was almost totally ignorant of the prices of the non-steel wool devices (Tr. 790-795), thus clearly indicating that the prices of such goods were of slight concern to respondent. The smaller steel wool manufacturers who appeared at the hearing also testified unanimously that the only prices which they took into consideration were the

prices of other steel wool products and that they did not consider the prices of the non-steel wool devices in setting their prices (Tr. 841, 973-938 [*sic*] and 897-898).

5. Unique production facilities

The facilities required for the production of steel wool are distinct from those required for the other cleaning devices cited by respondent. The production of steel wool requires large, complicated cutting machines and other accessory equipment is required such as "take-offs" and "balling machines" (Tr. 828), for the automatic shaping, soap-impregnation and drying of the product. The machines are not generally available on the open market, but are custom-made to the manufacturer's specification (I. D. 17). The machines used in the production of steel wool can be used for no other function than the production of steel wool (I. D. 17).

C. Conclusion

In conclusion we find of particular significance the facts that: (1) household steel wool is recognized by the industry as a separate and distinct market and that in making marketing decisions and in setting their prices the manufacturers of this product do not take into account the plastic and other types of cleaning devices referred to by respondent; (2) the substitute products advanced by respondent are significantly inferior in performance of the household cleaning chores performed by household steel wool and therefore they can at best offer only indirect competition to the household steel wool manufacturers; (3) there is a substantial difference between the price of steel wool and that of the plastic and other type cleaning devices; (4) and the machines used for the production of steel wool are distinct from those used for the production of the allegedly

competitive cleaning devices. Accordingly, we are of the opinion that it would be economically unrealistic to include said other products in the relevant market. Since the household steel wool industry is economically significant and sufficiently inclusive to be meaningful in terms of trade realities it seems clear that the hearing examiner was correct in determining that this is the appropriate market for adjudging the effects of the merger.

We note that the same conclusion was reached by the Commission in *Brillo Mfg. Co., Inc.* (Dkt. 6557, 1963) in which we considered the precise issue now before us. As we stated in that case:

> "* * * Steel wool is generally recognized as an essentially unique product, i.e., possessing peculiar characteristics and uses. It can be used either wet or dry on either a wet or dry surface. It will both clean and polish soiled and oxidized surfaces. It is fine and flexible so that it can be used on rough and irregular surfaces * * *
>
> "* * * [N]o competing product is capable of the variety of applications possible with steel wool. Any householder who has ever utilized steel wool to clean cooking utensils, white-wall tires, golf clubs, rusty tools, lineoleum or tile floors, and to remove peeling paint or rust recognizes that this is a uniquely versatile product * * *
>
> "* * * Moreover, both the industry members and the public recognize steel wool as an essentially unique product sold and distributed in its own separate markets. There is little or no cross-elasticity of demand between steel wool and other products. The machinery upon which it is produced cannot be utilized to produce products other than metal wool. * * *

"* * * The single most peculiar 'characteristic and use' of steel wool and steel wool products is that no other product will perform all of the multiple functions of steel wool in either the household or in the industrial market. The housewife can buy steel wool for dozens of household uses rather than buying separate products for each use. The same fact applies equally in the industrial field. Although other products may compete with steel wool for some uses, such demand exists at the outer boundaries of the steel wool market and need not be considered in evaluating the competitive impact of this merger between two steel wool producers."

II

The Competitive Effects of the Merger

The acquisition of S.O.S. by General Foods demonstrates the same anticompetitive effects as the acquisition by Procter & Gamble of The Clorox Chemical Company, which the Commission recently held to be violative of Section 7 of the Clayton Act. *The Procter & Gamble Company* (Dkt. 6901, 1963) (herein called the *Clorox* case). There is a substantial identity both in the structure of the household steel wool market involved in this case and the structure of the liquid bleach market involved in the *Clorox* case and in the significant operative facts respecting the impact of those mergers in their respective markets. A detailed comparative analysis of the relevant facts in the two cases is attached hereto as Appendix A.[8] While we will not detail

[8]The facts recited in Appendix A, together with those referred to in this opinion and those found by the hearing examiner to the extent the latter are not inconsistent constitute our Findings of Fact in this case.

in our opinion all of the factual similarities which are set forth in Appendix A, a few of the major conclusions respecting the competitive significance of these facts will serve to illustrate the basic identity of the two acquisitions and the reasons why our factual and legal analysis and conclusions in the *Clorox* case are applicable with even greater force to demonstrate the anticompetitive and illegal nature of General Foods' acquisition of S.O.S.

A brief summary of the operative facts respecting respondent's acquisition of S.O.S. is necessary before analyzing the competitive impact of this acquisition in the relevant household steel wool market.

A. The Household Steel Wool Market

S.O.S. at the time of its acquisition by General Foods in December 1957 was basically a single-product company engaged principally in the production of household steel wool pads (App. A, pars. 1, 3). Its sales of this product amounted to $14.6 million in 1957, representing 51% of the household steel wool market (App. A, par. 6). It also manufactured industrial steel wool which both parties agree is not included in this market definition as well as one plastic scouring device (App. A, par. 3). Its principal competitor, Brillo Manufacturing Company, Inc., also primarily a single-product company, accounted for 47.6% of the household steel wool market and the remaining 1.4% of the market was accounted for by three small companies with net assets valued at less than $500,000 each (App. A, pars. 5-7). Household steel wool products on the market are virtually indistinguishable from each other (App. A, par. 16). They are low-price, high-turnover household consumer commodities sold to consumers through grocery and supermarket outlets (App. A, par. 17).

Advertising is an essential factor in the marketing of steel wool pads, both as a means of building brand loyalty and of securing adequate shelf space (App. A, pars. 18-20). S.O.S. and Brillo had advertising budgets in 1957 of $2.2 and $1.8 million respectively, expended primarily for daytime TV and magazines (App. A, par. 19). Their three small competitors lacked the financial resources for advertising to any appreciable extent and accordingly were forced to market their products principally under private labels and through discount houses (App. A, pars. 20, 24).

Respondent General Foods Corporation is the largest producer of packaged food in the United States, with net sales of $1 billion (App. A, pars. 25, 27). General Foods also produces some nonfood items such as bluing (App. A, par. 26). All of its products are low-price, high-turnover household consumer commodities sold to consumers through the same grocery and supermarket outlets as are S.O.S. steel wool soap pads (App. A, par. 25). Mass advertising and promotions are essential factors in the marketing of General Foods' product lines (App. A, par. 28). General Foods had an advertising budget of $105 million and expended a substantial portion of this on nighttime TV. Its budget for consumer and trade promotions, which neither S.O.S. nor Brillo engaged in, amounted in 1957 to $19 million, exceeding S.O.S.' total sales in that year (App. A, par. 28).

After its acquisition by General Foods, S.O.S. was organized first as a separate division of General Foods and later, in 1960, was merged with General Foods Kool-Aid Division, the products of which were, like S.O.S. pads, also sold through food brokers (App. A, par. 33(g)). In 1962 General Foods incorporated the distribution of its Kool-Aid Division products into its overall distribution-sales service warehousing and distributive system, thus effecting estimated economies in transportation, ware-

housing and sales costs of $647,000, of which $388,000 was attributed to savings effected respecting the products of the Kool-Aid Division (App. A, par. 33(f)). This incorporation of S.O.S. directly into General Foods' overall distributional organization provided an incentive for General Foods' customers to include S.O.S. products in their orders of other General Foods products. Furthermore, S.O.S. could and did induce purchases by offering discounts based on combined purchases of the products of various divisions of General Foods. Presumably, General Foods warehousing and distributive system also improved S.O.S.' national availability (App. A, par. 33(f)). General Foods improved the appearance of the S.O.S. pad as well as its advertising. The costs of advertising S.O.S. products were substantially reduced by reason of the discounts which were available as a result of the overall General Foods advertising budget, estimated to amount to a net saving of 23% or a net increase in TV time of 28% in the case of network TV advertising, a 15% decrease in the cost of spot-TV advertising, a 5.5% decrease in radio advertising and a range of 5-15% discount in magazine advertising. General Foods also engaged in substantial consumer and trade promotions respecting S.O.S. pads which S.O.S. had not itself engaged in prior to the acquisition (App. A, pars 33(a)-(d), (i)).

After the acquisition, S.O.S.' share of the market increased from 51% in 1957 to 56% in 1962. The market share of Brillo, its nearest competitor, declined during this same period from 47.6% to 41.8%. The combined share of the three remaining companies increased slightly by 0.8%. On an absolute basis, S.O.S.' sales of soap pads grew from $14.6 million in 1957 to $19.1 million in 1962, an increase of 31% while Brillo's sales rose from $13.6 million to $14.3 million for the same period, or an increase of only 5% (App. A, par. 34). In December 1963 Brillo merged with Purex

Corporation Limited, a manufacturer of household cleansing products, with total sales for its fiscal year ended June 30, 1963 of $127 million (App. A, par. 37).[9]

B. Competitive Impact of Respondent's Acquisition

General Foods' acquisition of S.O.S. and consequent entry into the household steel wool market is a product extension merger identical in all respects to the extension of Procter & Gamble's product line to liquid bleach, a product which it had not theretofore produced or sold. As we noted in our *Clorox* decision, product extension mergers involve functionally closely related products by which we stated we "meant to * * * suggest the kind of merger that may enable significant integration in the production, distribution or marketing activities of the merging firms" (*Clorox,* p. 15). Integration at the marketing level we defined as encompassing integration of advertising and sales promotion activities and as resulting where the products of the merging firms were "sold to the same customers or are actually complementary" (*Clorox,* p. 15). In *Clorox* we pointed out that Procter was engaged in the sale of a broad range of low-cost, high-turnover household consumer goods sold to the consumer in grocery and department store outlets primarily through mass advertising and sales promotions. The liquid bleach market was held by us to be "virtually indistinguishable" from the markets previously utilized by Procter for its

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[9]The record contains no market data after 1963. Accordingly, the discussion in this opinion of the competitive impact of General Foods' acquisition of S.O.S. concerns the steel wool soap pad market as it existed prior to this merger between Brillo and Purex. While the record does not permit a definitive appraisal as to the impact of this merger on the household steel wool market, it should be observed that one of the anticompetitive factors considered by the Courts in determining the validity of mergers is their likelihood of triggering other mergers in the same market thus pyramiding their own impact on the market. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 343-44 (1962).

product lines insofar as "the problems and techniques of marketing the product to the ultimate consumer are concerned" (*Clorox*, p. 17). We pointed out that liquid bleach was functionally identical to Procter's product line "even if we look beyond household cleansing agents to the food, paper and toilet products which round out the Procter line" (*Clorox*, p. 17).

The functional relationship between S.O.S.' steel wool soap pads and General Foods' product line is identical as respects the problems and techniques of marketing involved in both groups of products. Household steel wool, like liquid bleach, is marketed by the same techniques (principally advertising and promotions) and through the same distributional outlets (principally supermarkets) as General Foods' other products and is purchased by the housewife at the same time and along with the other products sold by General Foods. Thus we hold that General Foods' acquisition of S.O.S. involves functionally related products and constitutes a product extension merger cognizable under Section 7 of the Clayton Act (See App. A, pars. 17, 18, 25, 28, 33).

The next question to be determined is whether this merger had the requisite anticompetitive effects to render it illegal under Section 7.

We find that General Foods' acquisition of S.O.S. had the same anticompetitive effects as those which we found to exist in Procter's acquisition of Clorox and on which we based our conclusion that that acquisition had the effect of substantially lessening competition in the household liquid bleach industry. Here, as there, the market of the acquired company was highly concentrated and oligopolistic (App. A, par. 6). Indeed, the steel wool soap pad industry appears even more concentrated, since it does not have the large number of small fringe companies which characterized the liquid bleach industry.

In *Clorox,* the acquired company was the dominant factor in the industry, the only national seller in an industry consisting primarily of regional sellers and able to command a premium price for its product. Its nearest competitor of significance was Purex with 15% of the market, which confronted Clorox directly in only 50% of the national market. In the steel wool soap pad industry, the acquired company, S.O.S., prior to its acquisition was also a dominant industry factor able to command a premium price, but, unlike Clorox, S.O.S. shared its dominant market position with Brillo (App. A, par. 6). Thus, the impact of General Foods' acquisition of S.O.S. was of greater anticompetitive significance than Procter's acquisition of Clorox, since whatever competition existed between Brillo and S.O.S. was far more distorted by the entry of General Foods into that market than was the competitive structure of the liquid bleach market by Procter's entry into that market. General Foods' entry into the household steel wool market eliminated the competitive balance between S.O.S. and Brillo and weighted it irrevocably in favor of S.O.S.

Thus, whereas in *Clorox* the acquisition of Clorox operated primarily quantitatively to render even more dominant the single dominant industry member, in the instant case the acquisition of S.O.S. by General Foods operated qualitatively as well to eliminate the market balance which had prevailed between the two dominant members of the industry and created a situation in which S.O.S. as a result of its acquisition by General Foods acquired decisive competitive advantages over Brillo. As we noted in our *Clorox* decision, it is the disproportionate strength of the companies in a market which is of major significance in judging its competitive viability or lack thereof (*Clorox,* pp. 23-27).

Not only did General Foods' acquisition of S.O.S. contribute to and increase concentration in the steel wool industry, but it also operated to render almost insurmountable

the barriers to entry surrounding this market. In this case, as in *Clorox,* the barriers to entry were high prior to the acquisition.[10] In each case, the product of the acquired company was functionally identical to that produced by smaller companies but was differentiated through extensive advertising and a long history of dominance in the field to such an extent that the smaller companies in the industry producing less well-known brands and potential producers of new brands could not penetrate the market to any significant degree, absent huge investments in advertising and promotions (App. A, pars. 16-23). The entry of General Foods into the household steel wool market substantially heightened the factual and psychological barriers to entry to that market, just as the entry of Procter in the liquid bleach market raised the barriers surrounding that market (App. A, par. 33). As we held in *Clorox,* such substantial heightening of the barriers to entry constitutes an important element in the finding that a merger is in violation of Section 7 (*Clorox,* p. 50).

General Foods, like Procter, is a powerful company, strongly entrenched in the marketing of low-cost consumer products to grocery stores with huge financial resources and advertising budget (App. A, pars. 25-28). Its presence in the soap pad market where the existing competitors were relatively small, like Procter's presence in the liquid bleach market, operated as a formidable barrier to new market entrants who, in order to gain a significant foothold in the market, would have to withstand the powerful competitive weapons available to General Foods which would imme-

[10]The high barriers to entry into the household steel wool market prior to the acquisition were attested to by General Foods in its pre-acquisition study, in which it concluded that "the fact that S.O.S. and Brillo have well-established product franchises is undoubtedly a restraining factor which does not invite widespread competition even though profit margins are very attractive" (CX 7, p. 23).

diately confront them upon their first entry (App. A, par. 33). Furthermore, General Foods' merger had exactly the same consequence which we noted in our *Clorox* decision is an important anticompetitive result of mergers of this type, namely, that of motivating the remaining firms in the market to seek protection by affiliating by merger with companies larger than themselves (*Clorox*, p. 55). This was what we predicted would happen in *Clorox* and what actually did occur after General Foods' acquisition when Brillo merged with Purex (App. A, par. 38).

General Foods' entry into the household steel wool market conferred on S.O.S. a series of advantages which its competitors could not match (App. A, par. 33). As we noted in our *Clorox* decision, "the merger of a relatively small, single-product firm with a very large multi-product firm enables substantial cost savings and other advantages in advertising and sales promotion, especially in television advertising." All of the discount rate and other cost-saving advantages in television,[11] radio and magazine advertising

[11]Respondent seeks to belittle the impact of the television discounts available to S.O.S. after the acquisition by contending that as a matter of fact Brillo was more efficient in its television advertising and that its television advertising costs were lower than those of S.O.S. (Respondent's Brief on Appeal, pp. 49-51). We reject this argument on its facts and on its logic. Respondent's calculations of relative costs and efficiency are based on Neilsen's estimates of actual viewers after the program has been contracted, paid for and shown. Thus, if the program attracted more viewers than originally estimated respondent would equate the resulting lower per viewer cost with greater efficiency. What respondent is in fact equating with efficiency is the popularity of a program not originally anticipated and therefore not paid for. We do not believe that this is a proper basis for determining costs and efficiency of advertising. If the figures relied upon by respondent show anything, they demonstrate that for the programs selected by respondent for its cost/efficiency calculation, S.O.S. spent far more on advertising after the merger than Brillo and its commercials reached many more viewers than Brillo's. S.O.S. was able to reach 700,120 viewers by spending $1,999,300 on the programs enumerated, whereas Brillo was able to reach only 336,459 persons as the result of its expenditure of $934,385 on the programs listed on which its commercials appeared (CX 170).

and in promotions as well as in marketing and distribution which accrued to Clorox as a result of its acquisition by Procter were demonstrated in this case to have accrued in large part to S.O.S. after its acquisition by General Foods (App. A, pars. 33(a)-(d)).

Due to the functional identity of the various household steel wool products (like the identity of the various liquid bleaches in their market), and the high degree of product differentiation, or preference by the consumers for the established, well-known brands, extensive advertising is crucial (App. A, pars. 16-22). Without widespread advertising a potential competitor cannot enter the market and an existing competitor will disappear (App. A, par. 18). Thus, just as Procter's ability to advertise and promote less expensively gave it a substantial competitive advantage over Clorox's competitors and inhibited the entry of new competitors so the ability of General Foods to secure lower advertising and promotion costs gave it a substantial advantage over S.O.S.' competitors and raised the barriers to entry into the market (App. A, par. 33).

After its acquisition by General Foods, S.O.S. could and did induce potential customers to purchase its steel wool pads by offering them discounts based on pooled purchases from various divisions of General Foods and by enabling customers to coordinate their steel wool soap pad orders with their orders of other General Foods' products. These were marketing advantages which accrued to S.O.S. solely as a result of the merger and which were not enjoyed by its single-product competitors (App. A, par. 33(f)).[12]

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[12]Respondent in its brief denied that its incorporation of S.O.S. into its Kool-Aid Division, with the resulting consolidation of the warehousing and distribution facilities of the two companies, achieved any cost savings or increased efficiency (Respondent's Reply Brief, pp. 8-10). Complaint counsel, on the other hand, argued the reverse (Complaint Counsel's Brief, pp. 44-45). To the extent the point

Again, as was also true with Procter, General Foods' position as a well-established producer of "must" items made it likely that it would be able to obtain from retailers various advantages in the display or marketing of its products which were not available to S.O.S. prior to the merger or to any of its competitors, all of whom were small single-product firms (App. A, par, 33(h)).

To the extent that unlawful exercise of its marketing power by Procter was taken into account in assessing the competitive impact of its acquisition of Clorox, so must this same factor also be considered in appraising the competitive significance of General Foods' acquisition of S.O.S. (*Clorox*, pp. 48-49). In this connection we find the same potential anticompetitive possibilities to be present in the General Foods' acquisition. The significance of this factor did not depend in the *Clorox* case on the few instances in the record where Procter had in fact exercised its power unfairly in the past, but rather on the fact that it possessed such market power to compete unfairly (*Clorox*, pp. 48-49). There is no doubt that the degree of market power enjoyed by General Foods is substantially identical to Procter's and that its possession of this power must be regarded as engendering the same potentially anticompetitive effects in the steel wool pad market as we found Procter's power potentially engendered in the liquid bleach market.

The so-called acceleration of competition which respondent alleges followed upon General Foods' acquisition of S.O.S. appears to us to have been somewhat ephemeral and in any event is not of such a quality as in our opinion changes or mitigates the deep underlying structural changes

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is relevant we find that cost savings did result (App. A, pars. 33(f) and (g)). We note, however, in this connection that whatever cost savings were achieved were not reflected in any reduction in the list price of S.O.S. pads and in fact after the merger one price increase was announced (App. A, par. 36).

which General Foods' acquisition accomplished in this market and which, in our judgment, constitute the same type of competitive destruction which we foresaw in the liquid bleach market after Procter's entry and which led us to conclude that that merger was illegal. In our appraisal of respondent's claims respecting the competitive "awakening" which allegedly followed its acquisition of S.O.S., we find particularly significant the facts that during the six-year period which followed the acquisition the only price change made by S.O.S. and Brillo was a price *increase*, that by 1962 General Foods (S.O.S.) had increased its market differential over that of Brillo to 14.2%, in contrast with the modest lead of only 3% which it had had in 1957, and that there were no new entries into the market during the period in question (App. A, par. 34).

The record indicates that another major multiproduct company—Colgate-Palmolive Company—was engaged in the sale of household steel wool in Canada (Tr. 947-948), and thus could be regarded as a potential competitor of S.O.S. Presumably there were other companies engaged in the sale of low-cost, high-turnover commodities in supermarkets, which could also be considered to have been potential entrants. Therefore, the entry of General Foods into the market did not eliminate all potential competition. Nevertheless, its entry did have the effect of substantially lessening potential competition, since it raised to virtually insurmountable heights the barriers to entry which had already existed to some extent; thus, the acquisition severely limited the role which potential competition could otherwise have played as a critical check on the ability of S.O.S. to stifle competition in the steel wool industry. (See *Clorox*, pp. 61-62.)

In sum, we conclude that the same discrepancies in size between the acquired and acquiring company, the same

threat posed by the acquisition to transform a basically single-product small firm industry into an industry in which the incentive will be to merge and ape the dominant company, the same probability that the acquisition would dampen or even eliminate whatever modest competition actually or potentially may have existed in the pre-acquisition market—all of these factors relied on in our *Clorox* decision apply with even greater force, and on the same legal and factual reasoning, to the steel wool soap pad industry.

As we emphasized in *Clorox*, advantages of scale can be an important factor heightening the barriers to entry and impairing competitive conditions in an industry. (See *Clorox* opinion at pp. 28-29, 31, 33, 46-47, 54, and 64-65). Whether a merger has or has not conferred benefits on either the customers of the acquired company or on the acquired company itself is not the primary inquiry which Congress and the Courts have commanded us to make in determining whether a merger violates the law or not. That a merger may "on some ultimate reckoning of social or economic debits and credits * * * be deemed beneficial" is a "value choice" from which we have been foreclosed from considering. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 371 (1963). The central inquiry is whether the merger will probably substantially lessen competition.[13] As we pointed out in our *Clorox* opinion:

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[13] E.g., 95 Cong. Rec. 11486. For discussion of the Congressional objectives in enacting the Clayton Act and of the case law see Comment, "'Substantially to Lessen Competition . . .': Current Problems of Horizontal Mergers," 68 *Yale L. J.* 1627, 1660 (1959); Blake and Jones, "In Defense of Antitrust," 65 *Col. L. R.* 377, 382 (1965) and Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 *Harv. L. R.* 226, 235-37, 318-21 (1911); some of the leading cases in which mergers were invalidated despite claimed efficiencies, e.g., *United States* v. *First National Bank and Trust Co.*, 376 U. S. 665 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 370-71 (1963); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 615-18 (S. D. N. Y. 1958).

> "In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the 'inefficient' small firms in the industry, proscribe a merger so productive of 'efficiencies.' The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent in only so far as it may tend to promote or retard the vigor of competition. * * * Congress did not mean the adjudicators of Section 7 cases to attempt to weigh the ultimate social and economic merits and demerits of a merger, but only to determine its effect on competition and monopoly" (Op., p. 64).

In the instant case we have concluded that General Foods' acquisition of S.O.S. will in fact substantially lessen competition in the steel wool pad market. We have based this conclusion on our finding that respondent's acquisition of S.O.S. has raised to virtually insurmountable heights entry barriers which were already high, that the presence of General Foods in the market has changed the steel wool pad market which prior to the merger consisted of two substantially equal-sized companies and several smaller firms to one in which S.O.S. is now dominant, and finally that the substitution of General Foods for S.O.S. will depress rather than enhance the competitive vitality of the market and will paralyze any incentive to compete which might otherwise have existed. The fact that these high entry barriers to potential entrants and the impairment of the competitive vitality of the market arises in part because

of the impact which General Foods' advertising, promotional and distributional resources had on potential and actual competitors in this market did not make its acquisition any less anticompetitive. Evaluation of competitive impact must take account of business reality and of the reaction of businessmen to a state of facts. The state of facts in the instant case is the effect on competition which General Foods' presence in this market will have. We have concluded that its presence in the market will be to lessen competition substantially. Because it chose to achieve this market position by merger it runs afoul of Section 7.

III

Relief

The order entered by the hearing examiner requires respondent to divest itself of the S.O.S. assets which were found to have been acquired in violation of Section 7. As we held in *Clorox,* this is the appropriate relief in a case involving a product extension merger of the type herein considered. We pointed out in *Clorox* that:

> "It is settled * * * that divestiture is normally the appropriate remedy in a Section 7 proceeding. *United States* v. *E. I. Du Pont de Nemours,* 366 U. S. 316. This case would be a particularly inappropriate one in which to make an exception. The anti-competitive effects of this acquisition are non enjoinable. They inhere in the very presence of Procter, standing in the place of Clorox in the liquid bleach industry [here the very presence of General Foods standing in the place of S.O.S. in the household steel wool industry], and can be corrected only by restoration of the market structure, so far as possible, as it existed at the time of acquisition" (*Clorox* Opinion, p. 70).

In conclusion, therefore, the initial decision, as supplemented and modified to conform to this opinion and to Appendix A attached hereto, and the order entered by the examiner, are adopted as the decision and order of the Commission.

The Commission's decision of this case is without the concurrence of Commissioner MacIntyre.

Commissioner Elman dissented and has filed a dissenting opinion.

March 11, 1966

Appendix A

Comparison of Operative Facts in the General Foods and Procter & Gamble Cases

Facts in the *General Foods Corporation* Case, Docket No. 8600	**Facts in the *Procter & Gamble Company* (Clorox) case, Docket No. 6901 (November 26, 1963)**
A. THE S.O.S. COMPANY, INC. AND THE HOUSEHOLD STEEL WOOL INDUSTRY PRIOR TO THE ACQUISITION	A. THE CLOROX CHEMICAL COMPANY AND THE HOUSEHOLD LIQUID BLEACH INDUSTRY PRIOR TO THE ACQUISITION
1. On December 31, 1957 General Foods Corporation (herein called GF) acquired The S.O.S. Company, Inc. (herein called S.O.S.) which was the nation's leading manufacturer of household steel wool (App. B., Table I). As of July 31, 1957 S.O.S. had net assets of almost $6 million and a net worth of $4,400,000, which was almost three times its total liabilities (CX 5(h)). Its net sales in 1956 amounted to $14,468,000, and its profits before taxes in that year ($3,214,000) amounted to a 22.2% return on net sales and over 72% of net worth as of July 31, 1957 (CX 5(h); CX 5(i)).	1. On September 30, 1957 Procter & Gamble Company (herein called P&G) acquired the Clorox Chemical Company (herein called Clorox) which was the nation's leading manufacturer of household liquid bleach. Clorox had annual sales of slightly under $40,000,000 (Clorox Opinion, pp. 1, 5).[1]
2. In GF's pre-acquisition report of S.O.S. it was stated that its sales of household steel wool would grow as the number of uses multiplied, the items within each were category expanded and the population increased, with an improving standard of living (CX 7, pp. 21, 22). The real growth of S.O.S. had been accomplished within the 10 years preceding the	2. P&G prepared a report prior to its acquisition of Clorox in which it predicted the ascendency of liquid bleach over powdered bleach (Clorox Opinion, p. 13).

[1]The citations are to the pages of the Commission Opinion on which the operative facts relied on where recited.

acquisition (CX 7, p. 21). Sales of S.O.S. soap pads increased from $3.9 million in 1948 to $14.6 million in 1957 (CX 5(g), CX 118(b)). According to the pre-acquisition study prepared by General Foods, this growth was due to the fact that the soap-pad products were "very efficient as a cleaner of aluminum and, as the use of aluminum has multiplied, sales of pads have increased. This growth has been abetted by the increased distribution of modern kitchen ranges and the need to clean burner plates, ovens and broiling pans" (CX 7, p. 21).

3. In addition to household steel wool, S.O.S. also produced small quantities of plastic scouring devices and industrial steel wool. In 1956 S.O.S.' sales of the former totaled $1.4 million (CX 5(g)), and its sales of industrial steel wool amounted to $229,000 (*Brillo Mfg. Co.*, D. 6557, 1963).

3. Clorox was engaged almost exclusively in the manufacture of household liquid bleach (Clorox Opinion, p. 6).

4. Prior to the entry of GF into the household steel wool industry, the industry had been basically a small-firm industry. Its total sales were less than $29 million annually (App. B, Table I).

4. Prior to the advent of P&G, household liquid bleach was basically a small-firm industry (*Clorox* Opinion, p. 55).

5. S.O.S.' principal competitor in the household steel wool soap pad business was Brillo Manufacturing Company, Inc. (herein called Brillo) with total sales in 1958 of 21.7 million dollars (CX 161). Like S.O.S. Brillo engaged almost exclusively in the manufacture of steel wool products, but also produced a relatively small amount of industrial steel wool and a plastic scouring device (*Brillo Mfg. Co.*, D. 6557, 1963; RX 4(b)(2)).

5. Clorox's principal competitor in the liquid bleach field was the Purex Corporation, with total sales in 1957 of approximately $50 million. Unlike Clorox, Purex manufactures, in addition to liquid bleach, a number of other products, including detergents, an abrasive cleanser and a toilet soap (*Clorox* Opinion, p. 6).

6. During the year 1957, S.O.S., with sales of household steel wool in the amount of $14,600,000, was the leader in the industry, with 51% of the national sales of household steel wool products. Brillo was a close second with sales of $13,629,000, or 47.6% of the market. Thus, the two together accounted for 98.6% of the market. Three smaller producers, Durawool Incorporated, American Steel Wool Manufacturing Company, Inc. and Alloy Metal Products Corporation, shared the remaining portion of the market, amounting to 1.4% (App. B, Table I). So insignificant were the market positions of the smaller companies that S.O.S. and Brillo could, and did, ignore them in their competitive activities (CX 7, pp. 21-25; CX 124). Durawool began producing household steel wool in or about 1952 or 1953 (Tr. 825-826). American first entered the business in 1898 (Tr. 921). Alloy began producing steel wool soap pads in late 1956 (Tr. 889-891). Alloy was dissolved in 1963 and its plant and equipment sold to Demcorp which subsequently entered the steel wool industry (Tr. 890, 901). Two other small producers of household steel wool had been eliminated from the market through acquisition by S.O.S. and Brillo respectively in 1954 and 1955 (CX 7, p. 19; CX 53; CX 118(b); Tr. 936).

6. In 1957, Clorox (with sales slightly under $40 million and 48.8% of the market) and Purex (with 15.7%) between them accounted for almost 65% of the nation's household bleach sales; four other manufacturers accounted for 15%; and the remaining 20% of the market was divided among approximately 223 small producers plus a "large number of extremely small" producers (*Clorox* Opinion, pp. 5, 6).

7. S.O.S. and Brillo had net assets of $6,000,000 and $8,000,000 respectively, while the net assets of each of the smaller manufacturers were valued at less than $500,000 (Answer Par. 2(d); CX 158(a); CX 156(b); CX 144; Tr. 871, 966).

7. Only eight of the liquid bleach manufacturers had assets in excess of $1 million. Very few had assets of more than $75,000 (*Clorox* Opinion, p. 6).

8. Both Brillo and S.O.S. had national distribution and sold their products in every state in the country (CX 7, p. 24; CX 124). S.O.S. had two plants in Chicago (CX 7, p. 26) and Brillo had two plants, one located in Ohio and the other in Brooklyn, New York (RX 27, p. 6). Each of the three smaller soap pad companies had only regional distribution. Durawool and American were limited to the northeastern area of the United States (Tr. 834-835, 923, 957), and Alloy, which indeed made no sales at all until 1958 (App. B, Table I) was limited primarily to Detroit, Michigan (Tr. 910).

8. Clorox, which had 13 plants distributed throughout the country, was the only producer selling on a national scale. Purex had as many plants as Clorox, but did not distribute its bleach in the northeast or middle-Atlantic states and sold in less than 50% of the national market. Most of the other liquid bleach manufacturers had only a single plant and were limited to a regional market (*Clorox* Opinion, p. 7).

9. While S.O.S. had 51% of the national market in terms of total dollar sales of household steel wool in 1957 (App. B, Table I), it had almost 55% of the combined S.O.S.-Brillo sales in the nation of soap-impregnated steel wool pads in terms of retail sales (App. B, Table II). Its share of combined S.O.S.-Brillo sales in terms of packages sold was proportionately higher in certain regions of the country, namely: 60% of New England, 75% in Chicago, 68% in the West Central Region, 66% in the Southwest Region and 77% in the Pacific Region (CX 7, p. 84).

9. While Clorox had 48.8% of the national market, it had 56% of the market in New England, 64% of the market in the metropolitan New York area, and 72% of the market in the middle-Atlantic states (*Clorox* Opinion, p. 7).

10. Except for metropolitan New York, S.O.S.' share of the combined sales of Brillo and S.O.S. soap-impregnated steel wool soap pads in terms of packages sold was at least 47.8% in each region. The only area in which Brillo had a greater dominance than S.O.S. was in metropolitan New York, where Brillo had 76.7% and S.O.S. had 23.3% of sales in terms of packages sold in April-May 1957 (CX 7, p. 84).

10. Even in areas where the principal competitors of Clorox were active, Clorox's total share of the liquid bleach market was high. Except in metropolitan Chicago and the west-Central states, Clorox accounted for at least 39% of the sales (*Clorox* Opinion, p. 7).

11. Between the founding of S.O.S. in 1919 and the mid-1930's its soap pads were protected by patent. After the expiration of this patent, no patent on the steel wool soap pad product or process has been in effect (CX 7, p. 21). While S.O.S. claims to have a "rust arrester" (CX 68) and Brillo advertises that its product contains a "rust resistor" (CX 167(k)), there is no indication in the record that either is the result of a secret process.	11. Neither the liquid bleach product nor its process is the subject of a patent or trade secret (*Clorox* Opinion, p. 6).
12. The American-made machines used for the manufacture of household steel wool are custom-made to the manufacturer's specifications (Tr. 847, 888-890, 908-909). A German-manufactured machine is available but cannot produce steel wool as efficiently as American-made machines (Tr. 847-848). Technical know-how is vital and constitutes a barrier to entry by potential competitors (CX 7, pp. 11, 23, 75).	12. The manufacturing process is relatively simple (*Clorox* Opinion, p. 8).
13. S.O.S.' costs of producing its products and of the equipment required to manufacture these products were low, compared with its sales and profits. In 1956 gross sales (less allowances and cash discounts) amounted to $15,728,000 and profits before taxes were $3,214,000 (CX 5(i)). The cost of goods sold was $7,144,000, or 45% of gross sales (less allowances and discounts) (CX 5(i)). Although there are no precise figures as to the costs of the raw materials (primarily steel and soap), it does appear that labor costs are low (CX 7, pp. 31 ff.). The cost of the equipment on the corporate books was $2,293,000 (CX 5(h)), which was $900,000 less than the profits for	13. The equipment, raw materials and labor required in the manufacture of liquid bleach are relatively inexpensive (*Clorox* Opinion, p. 6).

the year 1956. No accurate figures are obtainable as to the minimum costs of the equipment required to enter the business, but the evidence indicates that the approximate cost is between $200,000 and $300,000 (CX 156(b); Tr. 871, 966).

14. Steel wool soap pads are sold on a delivered price basis, with the manufacturer paying the freight. Shipping costs amounted to 11% of S.O.S.' production and distribution costs in 1956 (CX 5(i)). The President of American Steel Wool Manufacturing Company testified that freight "is a very large part of our costs" (Tr. 942). The President of Alloy testified that freight was "very definitely" a factor which prevented his company from selling in other parts of the country (Tr. 913). Demrack, of Demcorp, testified that "[f]reight rates are very high on steel wool. It carries a good class of freight. It carries a top class of freight. Percentage-wise it is very high" (Tr. 979). Transportation and warehousing together comprised 15% of S.O.S.' costs of production and distribution in 1956 (CX 5(i)).

14. Household liquid bleach is expensive to ship. Freight, which the manufacturer pays for, commonly averages more than 10% of unit cost. Liquid bleach was not profitably distributed outside of a 300-mile radius from the manufacturing plant (*Clorox* Opinion, p. 7)

15. The record contains no precise steel wool soap pad capacity data but indicates that the household steel wool soap pad industry has adequate capacity with an ability to expand, at least for short-range intervals (Tr. 428; RX 28(a)).

15. The liquid bleach industry is not plagued by inadequate productive capacity or shortages and industry members are not producing at full capacity (*Clorox* Opinion, p. 8).

16. Although the household steel wool soap pads produced by the various manufacturers can be distinguished from each other by such superficial characteristics as color and shape, there are no significant

16. All household liquid bleaches are chemically identical, and none is superior to any other (*Clorox* Opinion, p. 8).

differences in their essential ingredients, and they are substantially equivalent in quality and performance (Tr. 481, 566, 954).

17. Household steel wool is a low-price, high turnover consumer product sold to housewives mainly through grocery stores and self-service supermarkets (Tr. 492). Approximately 97% of S.O.S.'s soap pads were sold through grocery channels (CX 7, p. 22).

17. Household liquid bleach is a low-price, high turnover consumer product sold mainly to housewives in grocery stores (*Clorox* Opinion, p. 8)

18. The allocation of sufficient shelf space and the housewife's preconditioning to select a given brand are indispensable elements in the successful sale of the product. Advertising is vital in the sale of steel wool soap pads—so important, in fact, that, as respondent's Chairman testified, the cessation of advertising by S.O.S. would result in the loss of consumer brand loyalty, in the discontinuance of sales of the product by supermarkets and in the ultimate disappearance of the product from the market (Tr. 493, 494-5, 511, 524-25, 565-66, 557; CX 36, p. 7; CX 39, p. 9).

18. Successful sales of liquid bleach depend on the extent to which a manufacturer can presell it, and thus advertising and promotion are vital to create familiarity and brand loyalty for the product and insure that adequate shelf-space will be allocated to the product by the grocer (*Clorox* Opinion, pp. 8-10).

19. S.O.S. expended a total of $2,265,000 or 15.7% of net sales, for advertising in 1956 (CX 5(i)). In 1957, S.O.S. spent $711,000 for magazine and newspaper advertising, $22,000 for radio advertising, and $1,390,000 for TV advertising, or a total of $2,124,000 (CX 10). Brillo's advertising expenses amounted to $1,837,762 in 1957 (CX 159).

19. Prior to the acquisition, Clorox had advertised extensively. In 1957, it had spent $1,750,000 for newspaper advertising, $560,000 for magazine advertising, $258,000 for radio and billboard advertising, and $1,150,000 for TV advertising (a total of $3,718,000). Advertising expenditures were thus equal to almost 10% of total sales (*Clorox* Opinion, pp. 8-9).

20. The smaller competitors lacked the financial resources to engage in any substantial advertising (Tr. 836, 894, 972). Moreover, being re-

20. Most manufacturers of liquid bleach lacked the financial resources to advertise extensively (p. 9). Purex was a large advertiser but very

gional distributors, they could not derive the same benefits from advertising which were available to the national distributors, S.O.S. and Brillo. Due to the almost complete lack of advertising the smaller producers were virtually unable to obtain shelf-space in grocery stores and supermarkets (Tr. 836, 894, 942-954, 972-992).

21. Neither S.O.S. nor Brillo engaged in trade or consumer promotions to any significant extent prior to the acquisition. S.O.S. had a policy of not engaging in consumer or trade promotion (CX 5(b); CX 7, p. 36) and in 1957 Brillo spent nothing on consumer promotions of its soap pads and only $26,858 on trade promotions (CX 160).

22. Before a new brand of household steel wool may be successfully launched, extensive test marketing, accompanied by substantial outlays for advertising and/or promotions are necessary (Tr. 833, 967, 977).

23. Due to the nearly universal acceptance of their brands, S.O.S. and Brillo were able to command higher prices for their products than their lesser-known competitors. For example, as of December 1958, S.O.S. was able to charge $4.80 for twenty-four boxes of soap pads, containing *ten* pads each, whereas its competitors charged the following prices for twenty-four boxes, containing *twelve* pads each.

Brillo	$4.75
American	4.15
Durawool	4.50
Alloy	4.05

(CX 15, 130, 139, 151(a), 166(a)).

possibly less effective than Clorox because of Purex's territorially limited distribution (*Clorox* Opinion, p. 9).

21. Prior to its acquisition by P&G, Clorox had not been active in sales promotions (*Clorox* Opinion, p. 8).

22. There is evidence in this case that before a new brand of liquid bleach can be safely launched, it must be test-marketed locally (*Clorox* Opinion, p. 43).

23. Clorox is a premium brand that commonly sells for several cents per quart higher than regional or private brands (*Clorox* Opinion, p. 8).

24. As another result of the inability of the smaller companies to compete with the two dominant brands, the smaller manufacturers were relegated to the marketing of much of their steel wool soap pads under private labels and through discount houses and other outlets specializing in low-price merchandise (Tr. 832-834, 891, 922-923, 970-972). By way of contrast the two majors did little or no private label soap pad business. S.O.S. prior to the acquisition did a very small amount of private-label business through its Cleanser Products Division (CX 7, p. 19), but the overwhelming bulk of the production of these two companies was marketed under their two brandnames, "S.O.S." and "Brillo" respectively (Tr. 720-722; CX 124).

24. Most manufacturers of household liquid bleach sell at least part of their production to grocery stores and supermarkets for resale to the consumer under the stores' own brand names. These private or house brands, however, appear to account for only a small proportion of the total sales of liquid bleach. Clorox sells no private-brand liquid bleach—all of Clorox's bleach is sold under "Clorox" brand name—and Purex very little (*Clorox* Opinion, p. 6).

B. Position of General Foods Corporation

25. Respondent General Foods Corporation is engaged in the sale of a wide variety of low-price, high-turnover household consumer items sold to the consumer through grocery stores and supermarkets (CX 149). GF has 50% of the food sales markets in certain food products and is the largest packaged food manufacturer in the United States with net sales in the fiscal year ended March 31, 1957 of almost one billion dollars (CX 36). A substantial number of General Foods' present products were acquired through the acquisition by General Foods of the assets or stock of existing producers of such products. As of March 31, 1962 respondent had made about 69 of such acquisitions, including that of S.O.S. (Answer, par. 6).

B. Position of The Procter & Gamble Company

25. At the time of the acquisition Procter & Gamble was engaged in the sale of a wide range of low-price, high-turnover household consumer items which it markets through grocery, drug and department stores. P&G was one of the nation's 50 largest manufacturers, with total net sales in 1957 of $1.156 billion (*Clorox* Opinion, p. 10).

26. GF's product range consists principally of packaged food products and includes other non-food items such as bluing (CX 149).

26. P&G's main locus of activity was in the general area of soaps, detergents and cleansers, and it also manufactures a wide variety of various food items such as baking mixes and shortenings and other household products such as shampoos and dentifrices (*Clorox* Opinion, pp. 10-11).

27. In the fiscal year ended March 31, 1957 GF's net sales were approximately one billion dollars (CX 36) or more than 68 times the total sales of S.O.S. in 1956 (CX 5(i)) and more than 36 times the industry-wide sales of household steel wool in 1957 ($29,000,000) (App. B, Table I).

27. In 1957 P&G's sales of packaged detergents alone were 10 times the total sales of Clorox and 8 times the total sales of all of Purex's products combined. P&G's total sales were more than 20 times the total sales of Purex and more than 25 times the total sales of Clorox. P&G's total sales were more than ten times the industry-wide sales of household liquid bleach (*Clorox* Opinion, pp. 53, 55).

28. In 1961 General Foods ranked third among all manufacturing corporations and first among food processors in total advertising expenditures (CX 117(b)). Its advertising expenditures in that year amounted to $105,000,000 (CX 117(b)), or 50 times S.O.S.' advertising expenditures in 1957, the year preceding the acquisition (App. B, Table III). Respondent's consumer and trade promotions alone in 1957 amounted to $19,000,000 (CX 63), which was in excess of S.O.S.' estimated total sales in that year (CX 5(g)).

28. P&G is one of the nation's leading advertisers (*Clorox* Opinion, p. 12). In 1957, P&G spent upwards of $80 million on advertising and $47 million for domestic sales promotion. Domestic sales were approximately $900 million in that year (*Clorox* Opinion, p. 12).

C. The Acquisition by General Foods of S.O.S. and the Advantages to S.O.S. Which Accrued

G. The Acquisition by P&G of Clorox and the Advantages to Clorox Which Accrued

29. According to General Foods' pre-acquisition report, the acquisition could give GF "a dominant position in a tight little specialty market, similar to Postum in the non-coffee beverage field" (CX 7, p. 75).

29. According to P&G's pre-acquisition report, "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well" (*Clorox* Opinion, p. 13).

30. General Foods' pre-acquisition report predicted that the acquistion would give GF "an opportunity to effect economies in physical distribution" of S.O.S. products (CX 7, p. 75). The president of S.O.S. stated that "Large savings on advertising, warehousing and transportation [of soap pads] could be made with S.O.S. in the hands of one of the great national organizations" (CX 7, p. 70).

30. P&G's pre-acquisition report predicted that P&G's sales, distributing and manufacturing setup could increase Clorox's share of the market in certain areas where it was low and effect a number of savings that would increase the profits of the business considerably (*Clorox* Opinion, p. 13).

31. There is no indication in the record that General Foods had ever considered entering the household steel wool business by developing its own capacity or by acquiring one of the smaller competitors.

31. P&G had actually pondered the possibility of entry into the liquid bleach market on its own. Prior to the merger Procter was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect (*Clorox* Opinion, p. 61).

32. The assets of S.O.S. which were acquired by General Foods had a value of approximately $6 million and the stock of General Foods for which the assets were exchanged had a market value of $17,500,000 (Answer, Par. 2(d)).

32. The assets of Clorox, which were acquired by P&G had a value of approximately $12.6 million and the stock of P&G for which the assets were exchanged had a market value of approximately $30.3 million (*Clorox* Opinion, pp. 13, 14).

33. The following substantial cost savings and other competitive advantages accrued to S.O.S. as a result of its acquisition by GF:

a. *Discounts for Network TV Advertising*

S.O.S. was able to obtain gross-time discounts (by earning the hourly rate rather than the half-hourly rate) and an increase in its weekly discounts (CX 86F). The discount on gross-time amounted to 16⅔% (CX 81C, 81D, 82B, 82C, 83C, 83D, 84B, 84C, 85C, 85D, 86B, 86C, 86D, 87C, 87D, 87E, 88B, 88C, 88D). The weekly discount

33. The following cost savings and other competitive advantages accrued to Clorox as a result of its acquisition by P&G:

a. *Discounts for Network TV Advertising*

The maximum annual volume discounts available to the largest advertisers amount to 25%-30% for network TV advertising. In 1957, Clorox spent $1,150,000 on TV advertising. While complete discount rates are not included in the record, it is virtually certain that an expenditure of this size would not entitle Clorox to discounts of any

was inrceased from 6% (CX 81B, 83B, 85-O, 87F) to 15% (CX 82G, 84G, 86F, 88L). The result of the two discounts was to give S.O.S. a net saving of approximately 23% on its pre-acquisition advertising costs. By reason of the discount, S.O.S. was thus able to obtain at least 28% more television time for the same expenditure. The existence of TV discounts for large advertisers was referred to by the Chairman of the Board of General Foods (Tr. 529, 531).

b. *Discounts for Spot TV Advertising*

In December of 1957, S.O.S. contracted for 13 20-second announcements to be televised over WCIA-TV, Champaign, Illinois, between January 2nd and April 1st, 1958. The rate to be charged S.O.S. for these announcements was $180.50 each (CX 77A). After its acquisition by GF, the rate for each announcement was lowered to $152.00, a reduction of approximately 15% (CX 78B). Moreover, S.O.S.' advertising costs were subject to further reduction through the ability of General Foods to package a certain number of spots in one locality desired by one division with a certain number of spots in another locality desired by another division (Tr. 529).

c. *Discounts for Radio Advertising*

As a result of the acquisition, S.O.S. was able to have the rates for participation in a program on the Yankee Radio Network reduced by 5.5% (CX 79A, 80D).

substance. With Clorox now part of the Procter line, for the same amount of money Clorox spent on TV network advertising prior to the merger, at least 33⅓% more TV network advertising can now be obtained (*Clorox* Opinion, pp. 44-45).

b. *Discounts for Spot TV Advertising*

Discount rates available for local "spot" television advertising favor the large advertiser (*Clorox* Opinion, pp. 44-46). Moreover, the large national advertiser can furnish its divisions with coverage in a particular local area which it desires while spotting another commercial in another section of the country (*Clorox* Opinion, pp. 45-46)

c. *Discounts for Radio Advertising*

Substantial discounts are available to the largest advertisers for radio advertising (*Clorox* Opinion, p. 44).

d. *Discounts for Magazine Advertising*

The maximum discount appears to have been approximately 15% for *Better Homes and Gardens* (CX 75B, 76B, 76F). Other discounts were 5% for *Good Housekeeping* (CX 75B, 76B, 76D), 8% for *Ladies' Home Journal* (CX 75B, 76G) and 7.5% for *Everywoman's* (CX 76B and 76K).

d. *Discounts for Magazine Advertising*

The record discloses that maximum volume discounts of between 12% and 17% are available to advertisers in the leading women's or family magazines. An annual expenditure of $1 million or more may be necessary to earn the maximum in a particular magazine. Prior to the acquisition, Clorox received no discounts for magazine advertising (*Clorox* Opinion, p. 45).

e. *Ability to Purchase Television Programs*

Prior to the acquisition, S.O.S. could not afford nighttime network television advertising, which is the most desirable time to reach consumers (Tr. 439-440). Of five network shows produced by General Foods subsequent to the acquisition, the cost of each of three (the Danny Thomas Show, the Andy Griffith Show, and Gunsmoke) was greater than the entire S.O.S. budget for advertising, and the cost of two shows (Zane Grey Theater and Lucy-Desi Hour) was approximately equal to the entire advertising budget of S.O.S. (CX 46). After the acquisition, S.O.S. was able to participate in these nighttime programs because the amount of the cost allocated to S.O.S. was a fraction of the total cost of the shows. GF increased the amount spent on television advertising from $1,390,000 in 1957 to $2,520,000 in 1962 (App. B, Table III).

e. *Ability to Purchase Television Programs*

A commercial announcement during a television program is substantially more effective in promoting a product than one during the between program station break. Unless Clorox had been willing to put a disproportionate share of its advertising budget into a single venture, it could not, prior to the acquisition, have afforded to buy an entire network television program. Procter, however, can and does buy the sponsorship of such programs in behalf of several of its products, enabling Clorox to purchase network program advertising at a fraction of the previous cost. Moreover, even if Clorox could have purchased one show, it has the advantage now of being able to spread its sponsorship over more shows (*Clorox* Opinion, p. 45).

f. *Advantages Achieved Through Changes in Warehousing and Distribution*

Prior to the acquisition S.O.S.' products were shipped to some 32 independent warehouses scattered throughout the country from which they were then shipped to customers pursuant to specific order (CX 7, p. 35). In 1962 General Foods incorporated the distribution of the products of its Kool-Aid Division into its over-all distribution-sales service warehousing and distributing system, utilized by it for products of the Post, Jell-O, and Institutional Products Divisions, for the purpose of achieving savings to respondent in transportation, warehousing and sales costs, through economies resulting from the integration of the operations of their divisions (CX 120, 121). At the time the plan was adopted it was estimated that it would save the corporation $647,000, of which $388,000 was attributed to savings to the Kool-Aid Division. This latter figure included a saving of $317,000, resulting from the reduction in transportation costs from $2,044,000 to $1,727,000, and a saving of $102,000, resulting from reduction of warehousing costs from $632,000 to $530,000 (CX 121, Schedule A). As a result of the integration of S.O.S. into General Foods, S.O.S. was able to induce purchases of its products by (1) granting customers discounts based on pooled purchases of the products of General Foods' various divisions; (2) giving customers the convenience of including orders of S.O.S.' products in their orders of other General Foods' products; and (3) improving national availability (Tr. 512-515; CX 16(c)).

f. *(No comparable advantages referred to.)*

g. *Savings in Dealing With Brokers*	g. *Savings in Dealing With Brokers*
Prior to the acquisition S.O.S.' products were sold nationally through a network of independent brokers located in the major marketing areas of the United States (CX 128(d), (e), and (f)). Supervision of these brokers was maintained by S.O.S. through four regional sales managers (CX 7, p. 35). At the time of the merger S.O.S. was set up as a separate division of General Foods. In 1960 this division was merged into the Kool-Aid (Perkins) Division for the reason that the latter also sold its products through national networks of brokers. Dual brokerage, which existed in many areas with respect to the products of the two divisions, was gradually eliminated and by 1964 all of the products of the divisions were sold in particular marketing areas or territories by the same brokers (Tr. 786-789). Subsequent to the acquisition the commission paid to brokers on S.O.S. soap pads declined from 7½% of gross sales to 5% (CX 7, pp. 35, 76; Tr. 1278, 1317). On 1962 sales of S.O.S. soap pads of $19,170,-396.27, this would amount to a savings of $479,259.91 to respondent. The record does not indicate the reason for this decline. Nevertheless, even without considering this specific saving it would appear that the efficiency gained through the avoidance of dual brokerage resulted in substantial savings to General Foods.	(No comparable savings referred to.)

h. *Bargaining Position With Retailers*

That General Foods is the leading producer of a number of products marketed through grocery stores may enable it to induce retailers to give favored treatment to S.O.S. It seems likely that General Foods can obtain from retailers as a matter of convenience or expediency certain advantages in the display or marketing of its products which are not available to a single-product producer such as the pre-acquisition S.O.S.

i. *Ability to Engage In Sales Promotions*

Prior to the acquisition, neither S.O.S. nor Brillo engaged in promotions to any substantial extent. General Foods, a firm that in 1957 incurred sales-promotional expenses in an amount greater than S.O.S.' total sales was in an obvious position to utilize the sales-promotion technique on a wide scale on behalf of S.O.S. more efficiently and effectively than S.O.S. would have been able to do had it attempted to engage in promotions on the same scale. Respondent's chairman testified that it was able to save money in coupon promotions by having one center for the redemption of coupons (Tr. 534). Respondent may have also saved money through its ability to obtain lower prices by combining the various divisions' purchases of "bonus items" such as frying pans, kitchen tool sets, skillets, etc. General Foods has since the acquisition engaged in extensive promotions of the S.O.S. products. Trade promotions have included case allowances and free goods and have been utilized in selected areas as well as nationally

h. *Bargaining Position With Retailers*

That P&G is the leading producer of a number of products marketed through grocery stores may enable it to induce retailers to give favored treatment to Clorox. It seems likely that P&G can obtain from retailers as a matter of convenience or expediency certain advantages in the display or marketing of its products which are not available to a single-product producer such as the pre-merger Clorox (*Clorox* Opinion, p. 47).

i. *Ability to Engage In Sales Promotions*

There is testimony in the record that sales promotions are considered in the main too expensive for a single-product firm in the relatively small liquid bleach industry; thus, at the time of the merger, Clorox was engaged in virtually no sales promotion activities. P&G, a firm that in 1957 incurred sales-promotion expenses in an amount greater than Clorox's total sales, is in an obvious position to utilize the sales-promotion technique on a wide scale in behalf of Clorox (*Clorox* Opinion, p. 47).

(CX 7, p. 36; CX's 13, 51, 59, 66, 160). Consumer promotions, including price reducing coupons, free goods, contests, cents-off labels and reduced price premiums have also been used locally and nationally and cost $211,000 in 1963 (CX's 13, 51, 60, 66). Brillo also sharply increased its promotions after the acquisition (CX 163). Due to the lower prices which they could command and to the relatively higher costs of producing the product and of conducting a promotional campaign the smaller companies could not and did not engage in promotions (Tr. 836-837).

j. *Ability to Offer Merchants Special Prices*

Although respondent did not engage in local price-cutting as such, it did demonstrate its ability and willingness to concentrate its consumer and trade promotions in certain locations. In 1963, of the $137,736 spent on trade promotions, $35,409 were spent in Metropolitan New York, and of the $211,083 which it spent for consumer promotions in that year, $109,352 were for the Metropolitan New York market. Smaller firms, which cannot afford promotions, are driven from the supermarket shelves in the face of such intensive localized promotions (Tr. 837; CX's 59, 60).

k. *Ability to Engage in Systematic Underpricing*

This danger is present in this case to the same extent as it was in the *Clorox* case. However, the indication here is that the under-pricing may take the form of disproportionately high expenditures on promotions.

j. *Ability to Offer Merchants Special Prices*

To be able to offer lower prices to retailers requires the kind of pricing flexibility available only to a firm with ample reserves. Local price-cutting is prevalent but cannot long be maintained by a firm short on reserves. In a fight to the finish, P&G, whose scale of operations and fiscal resources dwarf the entire industry, can hardly be bested (*Clorox* Opinion, p. 48).

k. *Ability to Engage in Systematic Underpricing*

There is a danger that P&G may engage in systematic underpricing below cost (*Clorox* Opinion, pp. 48-49).

1. *Psychological Advantages*

Although there is no evidence that GF is a more feared competitor than was S.O.S., it seems reasonable to infer this from GF's history of success, its size, and its prowess. However unwilling a potential entrant would be to challenge the established position of two brands as well entrenched as are S.O.S. and Brillo when backed up by comparatively small companies, he would be undoubtedly far more reluctant to challenge these brands when one of them is backed up by a colossus of American industry, namely, GF. Thus the same psychological barriers which were found in *Clorox* to prevent entry of new competitors and limit expansion of existing competitors are present in this case, and in approximately the same degree.

D. MARKET SUBSEQUENT TO ACQUISITION

34. S.O.S.'s share of the market increased from 51% in 1957, the year preceding the acquisition, to 56% in 1962, while Brillo's market share declined from 47.6% in 1957 to 41.8% in 1962 (App. B, Table I). Hence the differences in the percentages of market shares between the two companies rose from only 3.4% in 1957 to 14.2% in 1962. The share of the independents had only increased to 2.2% by 1962. Moreover, S.O.S.'

1. *Psychological Advantages*

The record discloses that Procter is regarded by the firms in the industry as a well managed and aggressive competitor, more to be feared than Clorox. Market behavior is determined by the state of mind of the firms in the market. P&G's history of success, size and prowess must be considered significant competitive factors. Because a large multiproduct firm enjoys competitive advantages, the prospects become remote that small or medium-sized firms will be minded to enter the industry. Only very large firms can reasonably be expected to be able to compete on roughly equal terms. A small or medium-sized firm contemplating entry cannot ignore the fact that P&G is a billion dollar corporation whose marketing experience stems far beyond the limited horizons of the industry. Even a large firm would be loath to challenge a brand as well established as Clorox when that brand is backed up by powerful marketing capacities of a firm such as P&G (*Clorox* Opinion, pp. 49-51).

D. MARKET SUBSEQUENT TO ACQUISITION

34. Clorox's share of the market increased from 48.8% in 1957, the year of the acquisition, to 51.5% in 1961 (*Clorox* Opinion, p. 68).

share of the combined S.O.S.-Brillo sales of steel wool soap pads in grocery stores and supermarkets on a consumer dollar basis advanced from 54.9% in 1958 to 60.9% in 1963 (App. B, Table II). During the years 1958-1959, the disparity between S.O.S. and Brillo narrowed to .7% (App. B, Table I), but this appears to have been due principally to the fact that in those years S.O.S. failed to get on the General Foods night television programs and expended a relatively small proportion of its advertising funds on television advertising (App. B, Table III). On an absolute basis S.O.S.' sales of soap pads grew from $14,600,000 in 1957 to $19,170,000 in 1962, an increase of 31%, while Brillo's sales only rose from $13,629,000 in 1957, to $14,305,000 in 1962, an increase of only 5% in five years (App. B, Table I).

35. There were no new entries in the industry in the 6½ years which elapsed between the acquisition and the hearing except that Demcorp took over the defunct Alloy Metal Wool Products Corporation in 1963 (Tr. 890-901).

35. (No discussion of new entries subsequent to the acquisition.)

36. The single price change which took place was an increase in the price of S.O.S. soap pads in July, 1958 (CX 2(c)), which was apparently followed by Brillo.

36. (No price changes indicated.)

37. In December, 1963, Brillo merged with Purex Corporation Limited, a manufacturer of household cleaning products, which in the fiscal year ended June 30, 1963 had total sales of $127,000,000 (RX 27).

37. The remaining firms in the industry may now be motivated to seek affiliation by merger with giant companies (*Clorox* Opinion, p. 55).

Opinion and Order

GENERAL FOODS CORPORATION

DOCKET 8600

APPENDIX B

TABLE I
TOTAL MANUFACTURER'S HOUSEHOLD STEEL WOOL SALES*
(in thousands of dollars)

Year	S.O.S. Sales (000)	%	Brillo Sales (000)	%	Durawool Sales (000)	%	American Sales (000)	%	Alloy Sales (000)	%	Total Sales (000)
1955	$12,749	52.8	$11,043	45.7	$ 52	.2	$311	1.3	$---	--	$24,155
1956	14,343	52.7	12,486	45.8	49	.2	358	1.3	---	--	27,237
1957	14,600	51.0	13,629	47.6	64	.2	344	1.2	---	--	28,697
1958	15,044	50.4	14,387	48.2	85	.3	327	1.1	4	--	29,848
1959	15,159	49.4	14,948	48.7	122	.4	253	.8	215	.7	30,687
1960	18,102	54.0	14,983	44.7	134	.4	211	.6	117	.3	33,547
1961	18,966	57.0	13,751	41.3	205	.6	208	.6	175	.5	33,304
1962	19,170	56.0	14,305	41.8	425	1.3	265	.8	43	.1	34,208

*The above sales figures represent total sales by the manufacturers to their customers. It does not represent the total amount realized at the retail store level when the products in question are resold to consumers. (Tr. 1018, CX 20A-2, 20B-2, 20C, 118B, 130, 136, 137A, 150, 157; 169).

TABLE II

NIELSEN NATIONAL RETAIL MARKET SHARE STATISTICS (STEEL WOOL SOAP PADS)

Consumer Dollar Basis*
(in thousands of dollars)

YEAR	TOTAL SALES (000)	S.O.S (000)	S.O.S. % TOTAL SALES	BRILLO (000)	BRILLO % TOTAL SALES
F1958	$30,800	$16,900	54.9	$13,900	45.1
F1959	32,300	17,400	54.1	14,800	45.9
F1960	33,400	18,000	53.8	15,400	46.2
F1961	36,400	21,500	59.0	14,900	41.0
F1962	37,400	22,400	59.9	15,000	40.1
F1963	37,300	22,600	60.6	14,700	39.4

* The above sales figures represent sales of steel wool soap pads through grocery stores and supermarkets taken from CX 48.

TABLE III

ADVERTISING EXPENDITURES OF THE S.O.S. COMPANY (1954-1957) AND OF GENERAL FOODS - S.O.S. (1958-1963)

(in thousands of dollars)

Year	Newspapers (000)	Magazines (000)	TV (000)
1954	$ 5	$470	$1,300
1955	4	570	1,310
1956	1	650	1,150
1957		710	1,390
Acquisition on 12/31/57			
1958	580	600	550
1959	790	410	690
1960	2		1,950
1961	11		2,360
1962	9	13	2,520
1963	55		2,220

(CX 9, 10, 58)

TABLE IV

Retail Price of Household Steel Wool Products vs. Non-Steel Wool Products As Shown on Respondent's Exhibits 1-6 1/

Steel Wool Products

Product	Retail Price Per Package	Items Per Package	Price Per Item
Brillo Soap Pads	$ .28 2/	10	2.8¢
S.O.S. Soap Pads	.28 2/	10	2.8¢
American Soap Pads	.23	12	1.9¢
Dura Soap Pads	.45	30	1.5¢
Brillo Whitewall Tire Pads	.29	4	7.3¢
Grand Soap Pads	.35	18	2.0¢
Staff Soap Pads	.27	12	2.5¢
S.O. Ettes	.29	15	1.9¢
Paddy Soap Pads	.29	20	1.5¢
Spring Soap Pads	.69	50	1.4¢

Non-Steel Wool Products

Product	Retail Price Per Package	Items Per Package	Price Per Item
Golden Fleece (king size)	$ .29	2	14.5¢
Hand-eez Cleaning Pads	.19	2	9.5¢
Rubber Scrubber	.27	2	13.5¢
Glit Scour'n Wipe Pads	.24	4	6.0¢
Kurly Kate Pot Cleaners	.29	3	9.7¢
Tuffy	.23 2/	1	23.0¢
Glit Whopper Scrubbers	.29	2	14.5¢
Scrubbee Scouring Sponge	.29	1	29.0¢
Scotch Brite Scouring Pad	.29 3/	1	29.0¢
Handy Mandy Pot Cleaner	.10	1	10.0¢
Rescue Soap Pads	.29 4/	3	9.7¢
Terry Tex Scouring Pads	.23	3	7.7¢
Sudsy Scrubber	.29	1	29.0¢
Glit Scouring Sponge	.19	2	9.5¢
Magla Plastic Wool	.29	2	14.5¢
Kitchen Pal	.145	1	14.5¢
Gottschalk Stainless Steel Sponge	.19	2	9.5¢
Nylonet Scouring Pad	.29	1	29.0¢
Reddy	.10	1	10.0¢
Nif-Tee	.10	1	10.0¢

TABLE IV (cont.)

Non-Steel Wool Products

Product	Retail Price Per Package	Items Per Package	Price Per Item
Gottschalk Cleaning Pads. .	$ .23	3	7.7¢
Combo	.29	1	29.0¢
Dobie	.25	1	25.0¢
Kopper Kate Pot Cleaners. .	.29	3	9.7¢
Scour Puss.	.10	1	10.0¢
Squeeze Ease Scrubber . . .	.29	1	29.0¢
Tally Scouring Pad.	.25	1	25.0¢
Wund-R Spunge	.29	1	29.0¢

1/ Many of the items included by respondent on RXs 1-6 do not have retail prices printed or stamped thereon, and the record does not contain any other evidence of their price. These products have not been included here. They are: Brillo Cleanser, Fyne-Tex Soap Pads, Shop-Rite Soap Pads, Shop-Well Soap Pads, PolyPuff, Chore Girl Pot Cleaner, Merry Maid, Kitchen Queen Pot Cleaners, Scotch Brite Scrubbing Sponge, Ken-Mar, Scrubbee Pot Cleaner, Scrub-Stik Pot Cleaner.

2/ Price not shown on RXs 1, 3 but obtainable from Record at Tr. 780; CX 7, p. 24; RX 17, pp. 2-3.

3/ Price not shown on RX 1 but obtainable from Record at Tr. 1518-1519.

4/ Price not shown on RX 1 but obtainable from Record at Tr. 1479.

Dissenting Opinion

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
PHILIP ELMAN
EVERETTE MACINTYRE
JOHN R. REILLY
MARY GARDINER JONES

[SAME TITLE]

COMMISSIONER ELMAN, *dissenting:*

Unlike the majority, I do not regard this case as a mere replica of *Procter & Gamble* (*Clorox*). I do not agree that all of the factors relied on in *Clorox* "apply with even greater force, and on the same legal and factual reasoning", to this case. A conclusion that the merger in this case is illegal requires one, in my view, to move beyond the existing boundaries of the merger law. This does not mean, of course, that the Commission's decision is wrong. But it does mean that the process of decision should consist of more than treating this case as if it were simply an echo of *Clorox,* and as if illegality here were an *a fortiori* conclusion.

Without a doubt, this case and *Clorox* bear striking similarities. In both cases the acquired firm was a manufacturer of a high-turnover, low-cost, heavily-advertised consumer product. In this case, as in that, the acquired firm

had a position of great strength in a highly concentrated market where a very few sellers accounted for an overwhelming proportion of the business; and in both cases the acquiring firms were very much larger than the acquired firms. But—and this seems to me to be the basic flaw in the Commission's approach to this case—we cannot stop with the similarities and ignore the differences between the two cases.

At the outset, it is necessary to put *Clorox,* and the Commission's opinion in that case, in proper perspective. *Clorox* involved the kind of conglomerate acquisition that has come to be labeled a product-extension merger. The Commission approached the decision of that case with a candid recognition that it was largely writing on a clean slate. Eschewing reliance on specific prior decisions, the Commission stated that the lawfulness of the kind of merger involved in *Clorox* "is a question largely of first impression" which "has received little attention under the antitrust laws", and that the "absence of authoritative, specific precedents in this area compels us to look to basic principles in the interpretation and application of Section 7." (*Clorox,* pp. 18-19.) Reviewing "in the context of first principles" (*id.,* p. 23) the legal and economic problems posed by a product-extension merger, the Commission concluded that the legality of such merger could not be determined by applying relatively simple or quantitative tests, as in the case of a conventional horizontal merger, but required more extensive analysis. In dealing with a conglomerate merger of this sort, the Commission found, it was necessary to focus inquiry on the merger's impact on the structure of the market or markets affected, particularly to determine whether the merger resulted in excessive concentration, unduly raised barriers to entry into a relevant market, or substantially eliminated potential competition.

I shall not attempt here to restate, or even to summarize, the full scope of the Commission's 71-page economic and legal analysis of Procter's acquisition of Clorox. The elaborateness of the opinion in that case, as has been noted, reflected the Commission's awareness that it was entering relatively uncharted territory. Accordingly, the inquiry in *Clorox* extended over a broad range of factors, e.g., the relative disparity in size and strength as between Procter and the largest firms of the household bleach industry; the excessive concentration in the industry at the time of the merger, and Clorox's dominant position in the industry; the fact that Clorox's dominance was attributable to its advertising and promotional activities, there being no physical difference between competing brands of liquid bleach; the absence of any effective rivals of Clorox; the dominant position of Procter in functionally close markets, and its position as a probable entrant into the liquid bleach business; and the elimination, brought about by the merger, of Procter as a potential direct competitor of Clorox (and, of course, the corresponding elimination of Clorox as a potential direct competitior of Procter, had the latter entered the bleach industry through internal expansion).

The *Clorox* opinion made emphatically clear that the Commission based its decision not on any single factor but on a totality of circumstances "which, taken together (we need not, and do not, consider whether one or more of these factors, taken separately, would be dispositive of the case), persuade us that the instant merger violates Section 7". (*Clorox*, p. 53.) What makes this a difficult case, and not a carbon copy of *Clorox*, is that there are lacking here some important elements of the combination of factors upon which, in their entirety, the Commission relied in deciding *Clorox*.

The majority opinion characterizes General Foods' acquisition of S.O.S. as "a product extension merger identical

in all respects to the extension of Procter & Gamble's product line to liquid bleach". (P. 21.) Labels are convenient and can be helpful in promoting analysis, but not when the same label is attached to things that are not the same. There are product-extension mergers and there are product-extension mergers; and they are not all exactly alike. I agree that, for purposes of general descriptive classification, the acquisitions in both this case and in *Clorox* could be called product-extension mergers. But the label cannot resolve the question of legality. It no more follows that every product-extension merger is illegal than that every such merger is legal. Perhaps the time may come in the evolution of Section 7, as it is now written or as it may be amended by Congress, when the legality of a merger will be determined simply by attaching the proper label. But that time has not yet arrived, and I doubt very much that it ever will.

Unlike the product-extension merger in this case, the one before us in *Clorox,* as the Commission's detailed analysis abundantly demonstrated, had many of the same effects on competition as a conventional horizontal merger. Procter was the leading firm in the household cleansing agents industry of the United States. By its acquisition of Clorox, the Commission found, "Procter has not diversified its interests in the sense of expanding into a substantially different, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established * * *." (*Clorox,* p. 17.) To borrow an expression from a not too dissimilar context, it was Procter's "manifest destiny" to enter the household liquid bleach market. The whole logic of its corporate development; its size and direct proximity to the liquid bleach market; and the clear line and direction of its business growth, all pointed unerringly toward Procter's expanding into the household liquid bleach business. "At the

time of the merger," the Commission found, "Procter was a progressive and experienced manufacturer of many products in the same product line as liquid bleach; it had in the past frequently extended its product line by introducing a new brand in an industry in which it had not theretofore been active; it was one of the very few manufacturers of household products in the same general line as liquid bleach that was powerful enough to challenge, with some hope of success, Clorox's entrenched position in the bleach market; and it had actually pondered the possibility of entry into the liquid bleach market on its own." (*Clorox*, p. 61.) Moreover, Procter "was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect". (*Ibid.*)

These findings in *Clorox* were supported by specific documentation in the record. The evidence in *Clorox* disclosed that, after careful study of the various choices open to it, Procter decided to enter the household liquid bleach business through acquisition of Clorox, the dominant firm in that industry. After two years' study of the liquid bleach industry, a report of Procter's promotion department concluded: "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly, which would pay out reasonably well." (*Clorox*, p. 13.)

The Commission thus had before it in *Clorox* extremely persuasive evidence that the merger lessened potential competition in a most significant way. Potential competition was lessened not only by the elimination of Procter as a potential competitor of Clorox, but also by the elimination of Clorox as a potential competitor of Procter. Had Procter chosen to enter the bleach market through internal expansion, it would have encountered the formidable rivalry of Clorox, the dominant firm in the industry. That potential

rivalry disappeared with Procter's acquisition of Clorox. In a fundamental sense, the merger in *Clorox* eliminated direct (one might even call it horizontal) competition between Procter and Clorox—competition no less substantial and significant beeause it was potential rather than present.

In contrast, in this record there is no evidence that General Foods contemplated entry into the household steel wool market by internal expansion, or that such entry was its manifest destiny. Nor is there evidence that General Foods was regarded in that industry as a potential competitor. It cannot be found here that, by acquiring S.O.S., General Foods eliminated itself as a restraining force on the behavior of the dominant firms in the steel wool industry; or that it eliminated S.O.S. as a direct potential competitor which it would encounter upon its inevitable (or, at least, highly probable) entry into the steel wool market. The absence of this factor alone, which loomed so large in *Clorox,* makes this a different case.

There is some evidence in this record, similar to that in *Clorox,* that General Foods-S.O.S. will have some advertising and marketing advantages over its competitors. But it strains credulity to find that these advantages will be "decisive" or will lead to increased concentration in the steel wool industry. In the context of the household liquid bleach industry, the advertising and marketing advantages resulting from the Procter-Clorox merger affected important elements of market structure. Clorox, the only national marketer in the industry, held almost 50% of the market, while its nearest competitor, Purex, had a comparatively tiny 15% share. Almost any enhancement of Clorox's already considerable marketing advantage could bring it close to a virtually unchallenged market position. Put another way, a reduction in Purex's market share of only a few percentage points could render it completely helpless as a competitor. In this case, whatever advantages may accrue from the merger,

they will have little consequence, for General Foods-S.O.S. must meet the strong competition of Brillo, a national marketer enjoying almost 40% of the household steel wool market, as well as the giant marketers of "substitute" scouring products.

The Commission finds—and I agree—that the product market in which the competitive effects of the acquisition here should be measured is household steel wool. But the crucial question in this case is not one of defining the "relevant market". It is, rather, whether, as the Commission holds, the merger violates Section 7 because of "the deep underlying structural changes which General Foods' acquisition accomplished in this market". (P. 28.) Conceding that "the entry of General Foods into the [steel wool] market did not eliminate all potential competition", the majority opinion asserts that "its entry did have the effect of substantially lessening potential competition, since it raised to virtually insurmountable heights the barriers to entry which had already existed to some extent; thus, the acquisition severely limited the role which potential competition could otherwise have played as a critical check on the ability of S.O.S. to stifle competition in the steel wool industry." (Pp. 28-29.)

I cannot agree that the substitution of General Foods for S.O.S. in the household steel wool industry worked such "deep underlying structural changes" and had "the effect of substantially lessening potential competition". Whatever potential competition was eliminated is of paltry significance compared to what remains; and there is every indication that potential competition will increase, rather than decrease, in the future. To the extent that the possibility of new entry acts as a restraining influence on sellers in an oligopolistic or concentrated market, inclining them to maintain prices at a level low enough to discourage entry

(see *Clorox,* pp. 27-28, 61-62), the acquisition here cannot be regarded as affecting potential competition in any way that could reasonably be expected to influence the behavior of S.O.S., Brillo, and the other firms in the steel wool business. In determining the impact of this merger on competition in that market, I do not think that it is irrelevant, as the Commission does, that a wide variety of rival products —non-steel wool scouring devices made of plastic, nylon, silica, and metals other than steel—are being marketed with increasing vigor and success. It is evident from the advertising claims made for these products, which attempt to capitalize on the deficiencies of steel wool,[1] that they are aimed directly at the consumer who now purchases steel wool soap pads. These scouring devices are sold side by side with steel wool soap pads on supermarket shelves and arrive there through the same channels of distribution. And, as the hearing examiner found,[2] the manufacturers of the non-steel wool devices price these products to be competitive with steel wool soap pads, taking into account the claims of greater durability and efficiency made for the former products.

Non-steel wool scouring devices are new to the market, many of them only two or three years old, and their further development and improvement is inevitable. The inherent deficiencies of steel wool soap pads offer the tempting prospect of a large market waiting to be captured by any firm that can devise a better product. Since the end of World War II we have seen the development of many new products that at first appeared only at the fringes of a market and then later competed directly with older products, in

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[1]The claims made for various non-steel wool scouring devices include, "never frays or shreds", "long lasting", "safe", "no splinters", "kind to hands", and "one does the work of four rust and splinter soap pads".

[2]Finding of Fact 21 (I. D., p. 11).

some cases replacing them. An example is clear plastic wrap, such as Saran. When first introduced, this product could not be said to compete directly with household wax paper. Yet today there can be no doubt about the competition Saran presents to wax paper. Another example is the so-called miracle fibers which did not, immediately after their development, compete directly with cotton, silk, and wool; today, the producers of traditional, natural fibers are locked in direct, substantial competition with the producers of man-made fibers.

In its decision today, the Commission ignores the non-steel wool products and the competition which they represent to firms in the steel wool market. The Commission justifies this on the ground that the "relevant market" does not include these other products. But, as I have pointed out, the critical question in this case is that of determining whether, and to what extent, this merger will bring about "deep underlying structural changes" substantially lessening competition in the steel wool market. If, as the Commission holds, the legality of this merger must be judged by measuring its effects on potential competition, how can we close our eyes to anything that, as a matter of marketing reality, constitutes potential competition to firms in that market? If this were a conventional horizontal merger, it might well be unnecessary to consider its effect on potential competition. But where, as in this case, a conglomerate merger is being held illegal on the ground that it adversely affects market structure by lessening potential competition, we should view potential competition realistically and not on the basis of an abstract definition of "relevant market". In this case, it seems to me, no evaluation of potential competition is realistic if it ignores the emerging competition of the non-steel wool scouring devices. The manufacturers of these products include giants like duPont,

Colgate-Palmolive Co., General Mills, Minnesota Mining & Manufacturing Co., and General Cable Corp. These companies, with their vast resources and marketing power, are not likely to take a back seat to General Foods, or be afraid to compete with it. So far as these companies are concerned, any promotional or advertising advantages enjoyed by General Foods would impose no competitive handicap on them.

The difference between the Commission's approach and mine is illustrated by a simple example. Suppose Brillo, rather than General Foods, were to acquire S.O.S. In such a case there would be a palpable, immediate, substantial lessening of competition. Elimination of S.O.S., its leading competitor, would give Brillo a monopoly position in the household steel wool industry. That industry of course constitutes a "line of commerce" within Section 7, and I would agree that in the case of a Brillo-S.O.S. merger it would be unnecessary and unjustifiable to pursue inquiry into the existence or extent of potential competition from rival products outside the steel wool industry. The reason would be that a Brillo-S.O.S. merger would effect so great and so manifest a lessening of competition within the steel wool market that we would be justified in stopping inquiry right there, dispensing with any further reckoning of possible debits and credits. In the case of a horizontal merger of competing companies, a significant change in market structure occurs when concentration in the market is substantially increased or when the merger substantially adds to the size of an already dominant firm; and such a merger cannot be saved by a showing that potential competition has not thereby been lessened. *Ekco Products Co.*, F.T.C. Docket No. 8122 (decided April 21, 1964), p. 7, aff'd, 347 F. 2d 745 (7th Cir.).

However, a conglomerate merger, as in this case, has no immediate effect on the level of concentration or on the

shares of particular competitors in any market. General Foods' acquisition of S.O.S. does not pose the same kind of clear and present lessening of competition as would a Brillo-S.O.S. merger. Hence, as the Commission recognized in *Clorox,* and apparently here also, it is necessary to go further and determine whether the merger will affect market structure in a way important to the existence of competition. In appraising the competitive impact of this kind of merger, it is especially necessary that we "recognize competition where, in fact, competition exists". *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 326. Where the illegality of a conglomerate merger depends on an analysis of its effects on market structure, we should also recognize potential competition where, in fact, potential competition exists—and not disregard the rivalry of products which, though outside the defined "relevant market", nonetheless constitute potential competition to firms in that market.

In my view, the competition between household cleaning devices, steel wool and non-steel wool, is so visible and real that—in making any predictive judgment of the effect of this merger on potential competition in the steel wool market—it must be taken into account. By ignoring such competition, the Commission undermines the soundness of its prediction that this merger will significantly lessen potential competition and substantially raise barriers to entry into the steel wool market. On no realistic appraisal of the market would it appear that duPont, Colgate, and these other giants are likely to be discouraged from taking on S.O.S. as a competitor because it has been acquired by General Foods. In relation to these firms, the substitution of General Foods for S.O.S. has surely raised no barriers to entry or eliminated the potential competition that now exists.

The existence of these emerging competitors is critically important for another reason. One cannot ignore this com-

petition and make predictions about the possible impact of this merger on possible new entry by hypothetical steel wool manufacturers. For, on the one hand, to the extent that we are concerned about the restraining effects of potential competition on S.O.S.'s market behavior, is it not likely that the restraining influence of other scouring devices marketed by giant rivals, who already have made large investments in production and marketing facilities, will be great—indeed, greater even than any restraining influence exercised by the possibility that a hypothetical manufacturer, who has not yet made any commitment, might enter the market to do battle with Brillo and S.O.S.? On the other hand, to the extent that we consider the merger's effects upon the likelihood that such hypothetical steel wool manufacturers will enter the market and deconcentrate it, is it not more realistic to suppose that any such firms will more likely be deterred by the declining acceptability of steel wool soap pads,[3] as well as by the increasing efforts of giant marketers of rival products to capitalize on the deficiencies of steel wool soap pads?

Predicting that a merger will have a substantial impact upon potential new entrants is difficult enough in any case (*Clorox*, p. 52). And, as I have already pointed out, it is still an open question whether we would strike down a conglomerate merger where only one factor—such as a probable impact upon potential new entrants—was present. My point here is, however, that because of the emerging competition of other products and the declining acceptability of steel wool, as well as the other factors previously discussed which differentiate this case from *Clorox*, the net

[3]In the last few years, the public has become increasingly attracted to pots and pans with non-stick coatings, such as "Teflon". These utensils, which have the advantage of allowing one to cook without fats, cannot be cleaned with steel wool soap pads. Such utensils will undoubtedly expand the use of non-steel wool scouring devices.

"lessening" of potential competition resulting from this merger is too tenuous and too speculative to furnish adequate basis for striking it down.

The Commission also includes, as a ground for holding this merger unlawful, purported cost savings accruing to S.O.S. through efficiencies in warehousing and distribution (p. 20; App. A, par. 33(f)). In the first place, the cost savings referred to by the Commission represent lower costs to the entire Kool-Aid Division of General Foods, of which S.O.S. is merely a part. There is no evidence in the record to indicate how much, if any, of the savings is properly allocable to S.O.S. In fact, then, there is no evidence that its acquisition by General Foods gave S.O.S. an advantage over competitors by lowering its costs. More serious, however, is the erroneous legal significance which the Commission seems to attach to these alleged savings.

Economic efficiencies should not be a ground for the invalidation of a merger. Indeed, the promotion of competition has for one of its goals the achievement of greater efficiency. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1323-28. In *Clorox* the Commission found that "the large-scale advertising 'economies' involved in this case represent price concessions available only to giant firms, and bear little relationship to ordinary notions of economic 'efficiency'." (*Clorox*, p. 65.)

When a large diversified firm like General Foods acquires the leading producer in a concentrated industry, it is a cause for concern. It is possible that the substitution of General Foods for S.O.S. will have long-term anticompetitive effects. The merger may also be objectionable on broader social grounds, as contributing to an unhealthy concentration of the nation's productive resources in the hands of a few large firms. But the statute does not leave us free to strike down mergers on the basis of sheer specu-

lation or a general fear of bigness. See Turner, *supra*, at 1390. The statute requires proof of a reasonable probability that competition will be lessened substantially. As we pointed out in *Clorox*, "the language of Section 7 refutes any notion that every merger whose probable effect on competition is adverse is, for that reason, unlawful. . . . The impact must be significant and real. . . ." (P. 52.)

Section 7 does not incorporate into law the view that any acquisition made by a large firm which results in economies of scale thereby automatically lessens competition. Indeed, the Commission itself expressly rejected such a bold proposition not too long ago. *Union Carbide Corp.*, 59 F. T. C. 614, 658-59. In the present state of our knowledge of and experience with conglomerate mergers, we should move cautiously and tentatively. In this case, for the second time in recent weeks (see *National Tea Co.*, F. T. C. Docket No. 7453, decided March 4, 1966), the Commission, to my regret, takes a long step toward ruling that a "big" firm may grow only by internal expansion, and that any acquisition which makes it bigger thereby increases "concentration" and is therefore illegal.

Every merger of two firms, by eliminating one of them, to that extent increases "concentration" (in the sense of aggregate or national concentration). If increase in "concentration" is the standard to be applied under Section 7, every merger would be unlawful. But Congress did not prohibit all mergers but only those which are found to be anticompetitive in their probable effects. Under the statute we must draw a clear line between (1) those mergers which increase "concentration" *and* are anticompetitive, and (2) those mergers which increase "concentration" but are *not* anticompetitive. The decisions in this case and in *National Tea* blur, and may tend to erase, that line.

March 11, 1966

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,910

GENERAL FOODS CORPORATION, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Petitioner's Application for Leave To Adduce Additional Evidence Before the Federal Trade Commission

Petitioner hereby applies to the Court, pursuant to 15 U.S.C. § 21(c), for an order directing that additional evidence be taken before the Federal Trade Commission as to (1) the nature and causes of the decline (commencing in 1966) in the sales of steel wool soap pads and (2) the nature of the introduction of the new "Ajax" steel wool soap pad by the Colgate-Palmolive Company in 1966-67. As more fully explained in the attached memorandum and affidavit, the additional evidence relates to events which have occurred following the termination of the proceedings below (so that such evidence could not have been adduced during such proceedings) and are directly material to the factual propositions upon which the Federal Trade Commission relied and upon which this Court based its opinion of November 9, 1967.

Petitioner further requests that the Court stay the entry of judgment in this case until final disposition of this motion

and any further proceedings before this Court or the Federal Trade Commission.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,910

GENERAL FOODS CORPORATION, *Petitioner,*

v.

FEDERL TRADE COMMISSION, *Respondent.*

Affidavit of Peter Goold in Support of Petitioner's Application for Leave To Adduce Additional Evidence

COUNTY OF WESTCHESTER
STATE OF NEW YORK } ss.:

Peter Goold, being duly sworn, deposes and says as follows:

1. Since 1959 I have been employed by General Foods Corporation (hereinafter "GF"). Since 1965 I have worked for GF's Kool-Aid Division. I am now, and since April 1967 have been, Group Product Manager of Household Products for the Kool-Aid Division.

Appendix C

2. The personnel of the Kool-Aid Division have responsibility for keeping in close touch with all competitive developments which do or may affect the sales of S.O.S. soap pads and related household products. The Kool-Aid Division receives information on this subject from brokers who are selling such products for GF, from GF's own marketing personnel, and from independent market surveys made available to GF by the A. C. Neilsen Company and similar organizations.

The Recent Decline in the Sales of Steel Wool Soap Pads

3. In recent discussions with GF's counsel I pointed out to them that in the last two fiscal years (GF's fiscal year being a year commencing in April and terminating in March) there has been a decline in the sales of steel wool soap pads. Counsel then asked me to compare the recent trends in steel wool soap pad sales by all manufacturers with recent population trends as shown by the U.S. Census. Using such census figures and independent market surveys which are available to and used by GF in the regular course of business, I have prepared the following table as a basis for such a comparison for the period 1958 through 1965, inclusive. (In this table steel wool soap pad sales are measured in terms of GF's fiscal year, as defined above, while the population is measured by the U.S. Census in terms of a year commencing July 1 and terminating June 30.)

Year	Total Steel Wool Soap Pad Sales By All Manufacturers (In Units of 96 Pads)	% Change v. Preceding Year	U.S. Population	% Change v. Preceding Year
1958	13.4 million	—	172.0 million	—
1959	13.7 "	+2%	174.9 "	+2%
1960	14.0 "	+2%	177.8 "	+2%
1961	15.0 "	+1%	180.7 "	+2%
1962	15.0 "	0	183.8 "	+2%
1963	14.9 "	—1%	186.7 "	+2%
1964	16.3 "	+10%	189.4 "	+1%
1965	16.4 "	+1%	192.1 "	+1%

Appendix C

4. The temporary aberration which occurred in 1964 (*i.e.*, the unusual increase in steel wool soap pad sales) was a result of the fact that in 1964 GF and its principal competitor, Brillo, introduced two major new steel wool scouring products ("S.O.ettes" and "Paddy", respectively) and thus abnormally stimulated annual sales. As indicated in the foregoing table, in fiscal 1965 the trend of soap pad sales returned to normal and followed the trend in population growth.

5. Corresponding data for fiscal 1966 and fiscal 1967 indicates a complete reversal of the previous trend in steel wool soap pad sales. The figures are as follows:

Year	Total Steel Wool Soap Pad Sales By All Manufacturers (In Units of 96 Pads)	% Change v. Preceding Year	U.S. Population	% Change v. Preceding Year
1966	15.6 million	—4%	194.6 million	+1%
1967	14.6 "	—7%	196.8 "	+1%

To the best of my knowledge this is the first significant reversal in sales growth which has occurred in the history of the steel wool soap pad business.

6. An important factor in bringing about the foregoing reversal is the growing market position of various non-steel scouring devices which have come into the market in very recent years and which are sold in competition with steel wool products at competitive prices. One of these devices is the so-called "Rescue" soap pad manufactured by Minnesota Mining & Manufacturing Company. The product was put into national distribution in 1966 and has had a measurable impact upon the sales of the conventional steel wool scouring devices.

THE ENTRY OF COLGATE-PALMOLIVE'S AJAX POWER PAD

7. Through its usual sources of information (see paragraph 2 above) GF learned that in July 1966 Colgate-

Appendix C

Palmolive had introduced into Philadelphia and surrounding areas in Pennsylvania and New Jersey a new steel wool soap pad called the "Ajax Power Pad". Thereafter, in the fall of 1966 Colgate-Palmolive introduced the new product into Detroit and surrounding areas, and in the spring of 1967 the product was introduced into the New England area. A picture of an Ajax package which was recently purchased in a grocery store is attached hereto.

8. The three market areas mentioned above, taken together, represent an estimated 22% of the national market for soap pads. Independent market surveys indicate that in the same three market areas, taken together, the Ajax Power Pad has achieved a market share of at least 12%, 6% drawn from business formerly enjoyed by the S.O.S. soap pad and 6% drawn from business formerly enjoyed by Brillo.

9. The same sources indicate that the Ajax Power Pad's share of market may be growing. In the Detroit market its share has grown in the last six months from less than 10% to about 18%, approximately 10% drawn from S.O.S. and the remaining 8% from Brillo and other steel wool soap pad manufacturers.

PETER GOOLD
Peter Goold

Subscribed and sworn to before
me this 30th day of November 1967.

MARGARET MACARY
Notary Public
State of New York
No. 60-7645000
Qualified in Westchester County
Term Expires March 30, 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL FOODS CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
1. The companies involved	2
General Foods	2
S.O.S	3
2. The product market	4
The manufacture of household steel wool	4
Characteristics and uses	5
3. The merger	6
4. Post acquisition developments	7
5. The Commission's decision	8
Argument	9
Conclusion	17

CITATIONS

Cases:

Brown Shoe Co. v. *United States*, 370 U.S. 294 — 9, 10

Federal Trade Commission v. *Procter & Gamble Co.*, 386 U.S. 568 — 9, 13, 15, 16

United States v. *Philadelphia National Bank*, 374 U.S. 321 — 16

Statutes:

Clayton Act, Section 7, 64 Stat. 1125, 15 U.S.C. 18 — 2, 11

298-741—68——1

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Trade Commission's determination that the acquisition of the S.O.S. Company by General Foods Corporation violated Section 7 of the Clayton Act.

STATUTE INVOLVED

Section 7 of the Clayton Act, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The petition seeks review of a unanimous judgment of the court of appeals (Pet. App. A) affirming a decision of the Federal Trade Commission (Pet. 191a) that the acquisition in 1957 by General Foods Corp. ("G.F.") of the S.O.S. Company, Inc. ("S.O.S."), a manufacturer of household steel-wool cleaning pads, violated Section 7 of the Clayton Act. The pertinent facts are as follows:

1. The Companies Involved

General Foods. G.F. is the largest multi-product manufacturer and distributor of packaged foods in the United States; it has approximately 50 percent of the total value of domestic shipments of various

grocery products (R. 1a, 13a, 14a, 349a). Between 1955 and 1964, its net sales rose from $825 million to $1.3 billion (Pet. App. A, 3). G.F. markets about 250 items sold under more than 30 well-known brand names, including "Maxwell House," "Post" cereals, "Yuban," "Sanka," "Postum," "Birds Eye," "Jello," "Log Cabin," "Gaines," and "Kool-Aid."

The G.F. products are distributed through five operating divisions and are sold in hundreds of thousands of grocery stores and supermarkets throughout the country. G.F. has engaged in massive efforts to pre-sell its brand names to the ultimate consumer by means of advertising and sales promotions. In 1957, it spent $69 million in this effort, and in 1958, this figure had risen to $87 million (R. 7a, 15a, 16a, 1071a). By 1961, G.F. ranked third among all national advertisers (R. 1299a–1300a).

G.F. also spent substantial amounts to persuade retailers to place G.F. products on desirable shelf space. In 1957 it spent $9.8 million on trade promotions; by 1963, its expenditures for this purpose had more than tripled to $31.5 million (R. 1131a, 1139a).

S.O.S. The first company of significant size to emerge as a steel-wool manufacturer was Brillo, organized in 1913. S.O.S. commenced operations in 1919. It built its business primarily upon a household steel-wool pad impregnated with soap, which the company developed and distributed under the protection of various patents and patent extensions that expired in the 1930's. After the patents expired, Brillo and other companies also began to produce and market steel-wool soap pads (R. 982a, 1010a, 1021a).

In 1957, total industry sales of household steel wool aggregated $28.6 million. The sales of S.O.S. were $14.6 million, or 51 percent, and Brillo's were $13.6 million, or 47.6 percent of total sales (R. 209a, 226a). The remaining 1.4 percent was divided among three small producers, none of which had assets of as much as $500,000 (R., 588a, 641a, 1369a–1370a, 1378a, 1380a 1402a, 1415a–1417a). The court of appeals characterized the industry, on a national basis, as "an almost perfectly balanced duopoly" (Pet. App. A, 4). G.F.'s internal pre-aquisition report noted that "there are only two companies in the field which amount to anything," S.O.S. and Brillo (R. 984a).

In some local or regional markets, S.O.S.'s share was much higher. For instance, in April and May of 1957, its sales represented 77.5 percent of total sales on the Pacific coast, 75 percent in Chicago, 68.5 percent in the west-central region, 65.7 percent in the southwest region, 60 percent in New England, and 58.4 percent in the east-central region. Brillo's sales, on the other hand, accounted for almost 77 percent of total sales in the New York metropolitan area (R. 1027a; see also R. 320a, 452a, 705a, 986a).

2. The Product Market

The manufacture of household steel wool. The manufacture of steel wool is a highly specialized process, calling for critically important technical know-how and skill (R. 974a, 984a, 1021a). Steel wool is fabricated from high grade steel wire (R. 566a, 575a, 1128a, 1941a–1964a), which is drawn from large drums (R. 313a, 486a, 565a, 629a), and then "balled" accord-

ing to grade (R. 486a, 565a–566a, 623a). Thereafter, the balls or "puffs" that are to be converted into soap pads are conveyed into a soap impregnating machine and saturated with liquid soap (R. 486–487a, 566a). Except for packaging in cartons, the entire operation is fully automatic and a continuous process (R. 487a, 984a). In order to take advantage of economies in handling liquid soap and in volume production, and because of the long "start-up" time needed for the machinery, household steel-wool pads are manufactured on a three-shift round-the-clock production schedule (R. 488a–489a, 989a).

As the Commission found, the machinery used in the manufacture of this product is unique, large, complicated and delicate (R. 206a, 568a). The equipment is not available on the open market, but must be custom made to specifications and cannot practically be used to manufacture other products (R. 581a, 596a–598a, 610a–611a).

Characteristics and uses. In the home, steel wool is used principally for cleaning and shining pots and pans (R. 310a, 467a, 521a–522a, 574a, 606a, 625a). It also is used for cleaning whitewall tires, screens, stoves, barbecue grills, golf clubs, asphalt tile floors, and painted walls and surfaces (R. 310a–311a, 467a, 574a, 606a). According to witnesses in the trade, household steel wool is incomparable in the performance of these and a host of similar tasks (R. 315a, 316a, 439a, 575a, 579a, 625a, 703a). Among the witnesses was the former general manager of the S.O.S. division of G.F., who testified that he was familiar with, and had in fact tested, many of the allegedly substi-

tutable products, and had found that none of them could perform as well as S.O.S. pads "for the purposes that we advertise on the box." Consequently, he paid little or no attention to the pricing structure of "these small products" (R. 440a). Representatives of the small steel-wool manufacturing companies testified that their products competed only with other steel-wool products, principally those of S.O.S. and Brillo, and not with other household cleaning aids (R. 201a). These witnesses stated that they paid little attention to the prices of other cleaning products, but instead established their prices in relation to the wholesale prices set by S.O.S. and Brillo (R. 577a, 603a–604a, 623a–624a, 647a–649a).

3. The Merger

Serious negotiations for the purchase of S.O.S. began in 1957, following a general search by G.F. for attractive consumer products companies and the narrowing of the list to S.O.S. and two others (R. 1024a). After the controlling stockholders of S.O.S. indicated their willingness to sell, G.F.'s acquisition department undertook a detailed study of the company and of the steel-wool industry. The study concluded that Brillo was the only competition worth reckoning with, and that the acquisition would offer G.F. a "dominant position in a tight little specialty market" (R. 1021). The report also stated that:

> The processing of steel wool, however, is a specialty of its own. Thus it is not so exposed to fortuitous invention by other consumer goods

> marketers * * *. S.O.S. has as protectible a position as G.F. will get a chance at for many years to come [R. 974a].

On December 31, 1957, G.F. acquired S.O.S. for stock worth about $17.5 million, about three times the book value of its assets (R. 3a, 14a, 191a, 350a, 960a–964a, 1073a).

4. Post Acquisition Developments

Immediately after the merger S.O.S. was operated as a separate division of G.F. In 1960, however, it became part of the Kool-Aid division (R. 352a–353a). G.F. eventually supplied new management for S.O.S. and entrusted S.O.S. advertising to a new agency (R. 424a–425a, 427a, 694a–695a). On the advice of this agency S.O.S. substantially increased its expenditures for television advertising, from an average of $1.25 million annually in the period 1954–57 to $2.25 million annually during 1960–63 (R. 1029a–1030a, 1133a). Additionally, in 1963 G.F. spent $211,083 for S.O.S. consumer promotions and an additional $137,736 on trade promotions (R. 1134a–1135a). Prior to the merger S.O.S. had not utilized trade promotions and had spent very little for consumer promotions (R. 952a, 995a, 1047a–1049a, 1356a). Sometime after the merger, S.O.S. pads began to be sold through G.F. distribution centers from which customers could order the whole range of G.F. products and receive discounts on substantial multi-product purchases (R. 380a, 1054a, 1138a).

Although S.O.S.'s market share had fallen from 52.8 percent to 51 percent between 1955 and 1957, and

then to 49.4 percent in 1959, in 1960 its sales began to increase and by 1962 it had captured 56 percent of the market. Brillo attempted to counter the G.F. gains by substantially increasing its advertising expenditures and engaging in consumer and trade promotions, but in the expanding steel-wool market of 1959–1962 it suffered not only a loss of relative market share but also an absolute decline in dollar sales (Pet. 244a). The result, as the court of appeals described it, was that "[c]onfronted with steadily falling sales, a dangerously declining market share, and mounting advertising and promotional expenses, Brillo, in December 1963, ceased operations as an independent company and merged with Purex Corporation, Ltd." (Pet. App. A, 6–7).

5. The Commission's Decision

The Commission held that household steel-wool pads constitute an appropriate line of commerce, or product market, for measuring the effect of the acquisition (Pet. 192a–208a). On the basis of a detailed analysis of the evidence (*ibid.*), it rejected petitioner's contention that "approximately 40 other kitchen cleaning devices, composed of such materials as plastic, cellulose and metals other than steel," must be included in the market (Pet. 192a). After examining the competitive effects of the merger (Pet. 208a–222a), the Commission

> concluded that General Foods' acquisition of S.O.S. will in fact substantially lessen competition in the steel wool pad market. We have based this conclusion on our finding that

> respondent's acquisition of S.O.S. has raised to virtually insurmountable heights entry barriers which were already high, that the presence of General Foods in the market has changed the steel wool pad market which prior to the merger consisted of two substantially equal-sized companies and several smaller firms to one in which S.O.S. is now dominant, and finally that the substitution of General Foods for S.O.S. will depress rather than enhance the competitive vitality of the market and will paralyze any incentive to compete which might otherwise have existed [Pet. 221a].

The Commission therefore held that the acquisition violated Section 7, and directed G.F. to divest itself of S.O.S. (Pet. 222a–223a). The court of appeals unanimously affirmed (Pet. App. A).

ARGUMENT

This case presents no question warranting review by this Court. The issues raised by the petition relate primarily to the Commission's definition of household steel wool as a relevant product market, and its conclusion that the acquisition had the probable effect of raising barriers to entry and substantially reducing competition in that market. The Commission's decision was entirely consistent with applicable decisions of this Court, *e.g.*, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, and *Brown Shoe Co.* v. *United States*, 370 U.S. 294, and was, as the court of appeals concluded, fully supported by substantial evidence.

1. Contrary to petitioner's contention (Pet. 21, 18–

22), the holding in this case is not the broad proposition that "substitutional competition is legally irrelevant for Section 7 purposes". The Commission (including the dissenting Commissioner, Pet. 255a) justifiably found that household steel wool is an economically significant relevant product market (or "submarket"), partly on the basis of the fact that "the prices of steel wool pads * * * bear little or no relationship to the prices of non-steel wool cleaning devices" (Pet. 205a) and that "steel wool manufacturers paid little or no attention to the prices of the non-steel wool devices" (*ibid.*). The Commission thereupon proceeded in accordance with this Court's directive in *Brown Shoe, supra,* 370 U.S. at 325, that

> it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. *If such a probability is found to exist, the merger is proscribed.* [Emphasis added.]

Thus, upon finding that the acquisition would have the proscribed anticompetitive effect in the household steel-wool market, the Commission properly concluded that its inquiry was at an end. It is only in this context that the Commission rejected petitioner's contention that "we must nevertheless still consider the broader cleaning device market in our assessment of the competitive impact" of the merger (Pet. 198a n. 5). The dissenting Commissioner, disagreeing with the majority's evaluation of the evidence concerning the effect of the acquisition on competition

in the steel-wool market (Pet. 254a–255a), went on to consider questions relating to the broader market of substitutional competition which the majority properly deemed irrelevant to their decision. But, as the court of appeals recognized, this difference of opinion within the Commission provided no basis for the court to substitute its judgment for that of the Commission as to the inferences to be drawn from the evidence.

To the extent that this contention of petitioner is merely a reassertion, in slightly altered form, of the market definition argument which it advanced unsuccessfully before the Commission and the court below, the issue remains one that is merely factual and does not call for further review. In concluding that steel-wool soap pads were a distinct and significant product market for Section 7 purposes, the Commission considered in some detail the alleged substitute products. It found, however, that many of the alleged substitutes did not possess physical characteristics enabling them to compete with steel wool in its main use of scrubbing and polishing pots and pans (Pet. 202a–204a). The Commission also found that the prices of the alleged substitutes were different from and independent of those of steel-wool soap pads (Pet. 204a–206a). The court of appeals expressly affirmed these findings (Pet. App. A, 11–14).

Moreover, the Commission's decision to give little weight to the availablity of alleged substitutes rests in substantial part on the identical judgment of petitioner itself and competing steel-wool manufacturers. G.F.'s own market study concluded that the only significant competition for S.O.S. was Brillo steel-

wool soap pads (R. 350a, 966–1027a). G.F.'s own analysis was that plastic scrubbers such as "Tuffy" are "complementary rather than competitive" to steel-wool soap pads (R. 952a). Steel-wool manufacturers testified that they considered steel-wool pads a distinct market and that they paid little or no attention to the prices of non-steel-wool scrubbing devices (*supra*, p. 6).

Despite the strong evidentiary basis for the Commission's conclusion, petitioner now argues that greater weight should have been given to technological changes and promotional efforts on behalf of substitute products which ultimately may make inroads into the secure position steel wool now has in the field of household scouring products (Pet. 18–20). But in the ten-year period since the acquisition, during which petitioner claims that substitutes were enjoying substantial growth, S.O.S. has never been forced by the competition to lower its price. Indeed, its only price change was an increase (Pet. 217a–218a, n. 12), strongly suggesting a continuing substantial insulation from substitute competition.[1]

[1] Petitioner asserts that substitute products "are actually drawing business away from that submarket [steel-wool pads] at a rate which foreshadows the demise of the submarket itself" (Pet. 18–19). But the affidavit dated November 30, 1967, upon which petitioner bases this assertion (Pet. App. C; see Pet. 7 n. 5) does not indicate whether substitute products are being used for the purposes for which the Commission found that steel-wool pads have no effective substitutes (Pet. 202a–204a) or whether, instead, the alleged decline in steel-wool sales is attributable to increased kitchen use of such articles as teflon-coated or ceramic pots and pans, frozen foods in throw-away containers, throw-away broiler pans, aluminum foil, etc.

2. The substitution through merger of a powerful acquiring firm for a smaller, but already dominant firm may be unlawful because it adversely affects the competitive structure of the acquired firm's market by raising entry barriers. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 578. The Commission found that G.F.'s acquisition of S.O.S. would have this anticompetitive effect (Pet. 215a). Although G.F. disputed this finding below, the court of appeals concluded that there was substantial evidence that barriers to entry were "substantially heightened" by the acquisition (Pet. App. A, 19). Petitioner now argues that it was error for the Commission and the court below to disregard the size and strength of alleged potential entrants whose resources and marketing ability may be comparable to G.F.'s. The contention appears to be that, despite *Procter & Gamble*, acquisition by a giant outside firm of a dominant factor in a concentrated market, which has the effect of further entrenching that dominance and raising barriers to the entry of new competitors, is illegal only if barriers are raised high enough to keep out every potential entrant, no matter how large and powerful.

Not only is this argument unsupportable as a legal proposition, but an even more fundamental weakness is that the record references cited on page 12 of the petition do not establish that the large firms there identified by petitioner as "potential entrants into the steel wool soap pad business" are so in fact. To the extent that those record references relate to activities involving household scouring devices at all, they

refer only to present or potential activities relating to the making or marketing of plastic or other non-steel-wool devices. None of the cited companies has experience in the production of steel wool, which the record establishes as a highly complex and difficult process (see *supra*, pp. 4–5).

But even assuming that a few giant companies capable of exercising competitive leverage comparable to that of General Foods might have been potential entrants into the steel-wool scouring pad business, petitioner's argument would still be inadequate. The substitution of General Foods for S.O.S. as the dominant seller in the market was likely to increase the costs and competitive risks of entry for any potential competitor, even the largest and strongest. The Commission thus properly concluded that the merger had increased entry barriers—thereby making such barriers "insurmountable" for some companies with a consequent reduction in the number of potential entrants, as well as generally blunting incentives to enter, with the consequent probability that prices charged by firms in the market could be raised still higher before any new entrant, however large, would be attracted.[2]

3. Finally, this case presents no occasion for review of petitioner's contention that achievement of operating efficiencies cannot be relied upon as an affirmative

[2] The alleged fact that, *after the hearing examiner and the Commission had ordered G.F. to divest itself of S.O.S.*, Colgate-Palmolive first introduced its steel-wool soap pad into the United States, (Pet. 7 n. 5; Pet. App. C, 4–5), does not undermine the Commission's finding that the merger increased entry barriers.

ground for prohibiting a conglomerate merger (Pet. 26–29). That was not the basis of the Commission's decision. The Commission held that the present case was controlled by its previous decision in *Procter & Gamble Co.* (see 386 U.S. 568). This was clearly articulated in the Commission's opinion (Pet. 208a):

> The acquisition of S.O.S. by General Foods demonstrates the same anticompetitive effects as the acquisition by Procter & Gamble of The Clorox Chemical Company, which the Commission recently held to be violative of Section 7 of the Clayton Act. * * * There is a substantial identity both in the structure of the household steel wool market involved in this case and the structure of the liquid bleach market involved in the *Clorox* case and in the significant operative facts respecting the impact of those mergers in their respective markets. A detailed comparative analysis of the relevant facts in the two cases is attached hereto as Appendix A.

Appendix A to the Commission's opinion demonstrates in detail that substantially the same competitive advantages found in *Procter & Gamble* to have accrued to Clorox as a result of that merger would also accrue to S.O.S. as a result of the present merger (Pet. 234a–236a, 239a–241a). It was on the basis of these competitive advantages—with their consequent raising of entry barriers and restraining of the vigor of competition in the relevant market itself—that this Court upheld the Commission's decision in *Procter & Gamble*, and it therefore follows that the Commission similarly was justified in condemning the present

merger.[3] The fact that the Commission also stated that the present merger would confer upon S.O.S. additional competitive advantages that the Procter & Gamble merger did not confer upon Clorox (Pet. 237a–238a) and hence that its *Clorox* decision was "applicable with even greater force" in the present case (Pet. 209a), neither undermined the agency's basic conclusion that *Procter & Gamble* controlled this case nor indicated that those additional competitive advantages were essential to its holding of illegality. It is, of course, settled law that these additional competitive advantages (or "efficiencies" as petitioner calls them) conferred upon S.O.S. cannot justify an otherwise unlawful merger. *Procter & Gamble Co., supra*, 386 U.S. at 580; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371.

[3] It may further be noted that the competitive advantages thus relied upon in these two cases are not production or distribution efficiencies that would be available to any firm and would exist in a truly competitive market, but are advantages available to a particular competitor only because of its sheer market power. For example, nothing in the record would indicate that the volume discounts that G.F. could obtain for S.O.S. television and other media advertising reflect any savings in operating costs by the media. Cf. *Procter & Gamble*, *supra*, 386 U.S. at 579. Similarly, the Commission's finding that G.F. probably would be able to obtain favored display and shelf space for S.O.S. (Pet. 239a) plainly is unrelated to any possible cost savings by retailers. Cf. *Procter & Gamble*, *supra*, 386 U.S. at 575.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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INDEX

	Page
Argument	1
Conclusion	13

CITATIONS

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 3, 4, 5

Federal Trade Commission v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) ..... 5, 6, 8 n.6, 11, 12 & n.8

St. Joseph Stock Yard Co. v. *United States*, 298 U.S. 38 (1936) 12

United States v. *Continental Can Co.*, 378 U.S. 441 (1964) ... 5

United States v. *El Paso Gas Co.*, 376 U.S. 651 (1964) 5

United States v. *Penn-Olin Co.*, 378 U.S. 158 (1964) 5

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FEDERAL TRADE COMMISSION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

The brief in opposition filed by the Government seems to be misdirected. It simply does not address itself to the questions raised by petitioner.

In this respect the tone is set in the first half of the brief, the nine-page "Statement" of the case. It is quite apparent that the propositions included in the Statement were selected, not on the basis of their relevance to the issues raised in the petition, but in an effort to create the impression that the result below, no matter how reached, was correct. Included are a number of

questionable assertions, but because the Statement as a whole is almost entirely irrelevant to the only three points at issue, we will not burden this reply brief with a complete response.[1]

Similarly, the "Argument" largely misses the point. The petition raised three significant issues of antitrust law. As to *each,* the brief mischaracterizes the point and, having thus created a straw man, knocks it down. In the process, since the brief does not speak to the issues raised by the petition, the Government has failed to make a case against the importance of the issues or the appropriateness of their review by this Court.

1. The Government's position on the first point is basically that petitioner's position here is "merely a reassertion, in slightly altered form, of the market definition argument which it advanced unsuccessfully" below. (Br. 9) Conceiving the first issue thus, the Government then portrays GF's argument as merely a factual attack on the factual conclusions reached below

[1] Two or three examples will show that the propositions asserted in the Statement must be viewed with caution: (1) A considerable effort is made to create the impression that there are enormous obstacles, technological and otherwise, to entry into the steel wool business. (Br. 4-5) In fact, the record shows that it is relatively inexpensive and easy, even for persons with no steel wool manufacturing experience, to enter and succeed in the market. (R. 229a, 565a, 588a, 613-14a, 640a, 966a) (2) The brief also attempts to create the impression that after and as a *result* of the merger S.O.S.'s market share increased substantially. (Br. 8) In fact the Examiner found, with the apparent approval of the Commission, that the increase in market share was brought about by developments unrelated to GF's ownership of the business. (R. 176a, 208a n. 8) (3) The brief attributes certain motivations and thought processes to Brillo, S.O.S.'s principal competitor, as though there were evidence in the record as to Brillo's reactions to the merger (Br. 8), but in fact there was no evidence whatever as to Brillo's reactions to GF's presence in the market.

on the market definition question, and on this basis the Government undertakes an extended and frequently doubtful factual justification of those conclusions.[2] But of course GF here has not attacked those conclusions at all, and the Government's attempted justification of the market definition adopted below is completely beside the point.

The difference between the parties on this portion of the case lies in the distinction between two different tasks which must be undertaken by the deciding tribunal in a conglomerate merger case. An important preliminary task, of course, is that of defining the relevant product market or submarket according to the criteria laid down in this Court's decision in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, and related cases. The function requires an examination of existing products and the methods then prevailing in their

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[2] Examples of the Government's handling of the facts are as follows: (1) The brief asserts that the Commission found that the prices of non-steel substitute products were "independent of those of steel-wool soap pads." (Br. 11) The Commission did not so find. In fact the Examiner below found, on the basis of uncontroverted evidence, that the prices of the substitute products were based directly on steel wool prices (R. 171a; *see* R. 535a, 785a, 893a, 895a), and the Commission affirmed that finding. (R. 208a n. 8) (2) The brief asserts that "in the ten-year period since the acquisition" GF-S.O.S. made only a single price change, and that that change was a price increase. (Br. 12) There was a price increase in 1958, a few months after the acquisition, but it was the direct result of an increase in the price of steel (R. 945a), and thereafter, as Commission counsel emphasized in the Court of Appeals, there were frequent competitive price reductions. (Brief for Respondent at 59) (3) The Government attempts to brush aside the recent decline in steel wool soap pad sales by saying in effect that the affidavit which establishes that decline does not indicate that the decline has been caused by substitute products. (Br. 12 n. 1) In fact the affidavit states explicitly that the substitute products have been "[a]n important factor in bringing about the foregoing reversal . . . ." (Pet. App. C. p. 4)

production and sale (*e.g.*, "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors"; 370 U.S. at 325). This evaluation of existing products was undertaken by both of the lower tribunals in this case, and all of the commissioners and judges who expressed their views (including Commissioner Elman) agreed on the market definition. As the petition makes clear, the propriety of the market definition below is simply not at issue here.

What *is* at issue is whether the lower tribunals, having completed their market-definition function, could then treat as irrelevant affirmative evidence of emerging substitutional competition—or whether they had an additional responsibility with respect to that subject matter. The Government's position is that, once the market has been defined under the *Brown Shoe* criteria, no further consideration need be given to substitute products for any purpose. But Commissioner Elman put his finger on the error in this position. He pointed out that an additional and quite distinct inquiry with respect to substitute products remained—namely, the task of evaluating the emerging role of any potential competition that might exist in the form of companies engaged in the development of substitutional products for the future:

> "In its decision today, the Commission ignores the nonsteel wool products and the competition which they represent to firms in the steel wool market. The Commission justifies this on the ground that the 'relevant market' does not include these other products. But, as I have pointed out, the critical question in this case is that of determining whether, and to what extent, this merger will bring about 'deep underlying structural

> changes' substantially lessening competition in the steel wool market. *If, as the Commission holds, the legality of this merger must be judged by measuring its effects on potential competition, how can we close our eyes to anything that, as a matter of marketing reality, constitutes potential competition to firms in that market?* (Pet. App. B., p. 257a) (Emphasis added.)

Commissioner Elman also made clear that this second function, the evaluation of the role of the potential competition of emerging substitutes, requires a consideration of a number of economic factors (*e.g.*, the size, aggressiveness, marketing prowess, and history of success of the manufacturers of the emerging substitutes, the probable psychological impact in the future upon companies within the market, etc.) which are outside the scope of the problem of market definition under *Brown Shoe*.[3] These economic factors must be weighed in accordance with the standards announced by this Court in *El Paso, Penn-Olin, Continental Can,* and *Clorox,*[4] rather than the market definition criteria previously laid down in *Brown Shoe*. The latter criteria were never intended for this purpose. In other words, the second function involves a kind of inquiry which is entirely distinct from the only inquiry undertaken by

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[3] The Government's brief makes an effort to portray the disagreement between Commissioner Elman and his brethren as merely a disagreement as to the "evaluation of the evidence" and "the inferences to be drawn from the evidence" (Br. 10, 11), but the issue was and is far more fundamental. The Commission majority regarded potential competition in the form of emerging substitutional products as irrelevant as a matter of law, and Commissioner Elman quite properly disagreed as a matter of legal and economic principle.

[4] United States v. El Paso Gas Co., 376 U.S. 651 (1964); United States v. Penn-Olin Co., 378 U.S. 158 (1964); United States v. Continental Can Co., 378 U.S. 441 (1964); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

the tribunals below—and in this respect the only point at issue is whether those tribunals had a duty, as a matter of law, to undertake the second inquiry as well as the first.

To the extent that the Government's brief comes to grips with this issue at all, its argument seems to be this: that, although under *Clorox* the role of potential competition generally is crucial in conglomerate merger cases, potential competition in the form of substitutional products is *not* relevant except insofar as it may be taken into account in identifying the existing products to be included in the relevant product market. In other words, if existing competition from substitutes is not "actual" enough to be included within the relevant product market at the time that market is defined, then it is legally unnecessary to take emerging substitutional competition into account as a future restraining influence upon the exercise of oligopoly power within the market. This position, upon which the decisions below stand or fall, is, we submit, so economically unsound, so inconsistent with this Court's realistic analyses in prior potential competition cases, and so damaging to the antitrust treatment of conglomerate mergers, that this Court should grant certiorari.

2. On the second question raised by the petition the Government has again mischaracterized the point. The brief in opposition states that petitioner's contention "appears to be" that a merger which raises entry barriers "is illegal *only* if barriers are raised high enough to keep out *every* potential entrant, no matter how large and powerful." (Br. 13) (Emphasis added.) Having thus reconstructed petitioner's argument, the Government proceeds to demolish it, but, since the attributed argument is both absurd and non-existent, the Government's discussion of it totally misses the point.

The question actually raised in the petition is simply this: where a merger is said to have raised entry barriers to a certain extent, but where significant potential competition has survived, does the raising of the barriers (to the extent that it has occurred) *ipso facto* establish a substantial lessening of competition and end the inquiry—or is it necessary for the deciding tribunal to go on to evaluate the influence of the potential competition which has survived? The Court of Appeals below took the first step, but it refused to take the second.

The court's error, and the error underlying the Govment's position here, both stem from a failure to recognize that the significant question in entry barrier analysis is not whether the challenged merger has in fact made it more difficult for one firm or another to enter the market, but whether the merger has substantially diminished the influence of potential entrants, taken as a group, as a restraining (*i.e.*, psychological) influence upon firms within the market. For example, it would be perfectly possible for a particular conglomerate merger to affect the private plans of one potential entrant or another without really diminishing the influence of potential competition as a whole. That being so, it is not sufficient to argue, as the Government does, that "*some* companies" outside the steel wool market may have been discouraged from entry to some unspecified extent by the challenged merger. (Br. 14)[5] The essential inquiry remains whether, given the number, size, market power, etc., of

[5] In fact the Government's argument is based on pure speculation; there is no evidence that any potential entrant was actually discouraged from entry by the merger. Indeed, the evidence is to the contrary: three companies have entered the steel wool market in the post-acquisition period. (*See* Pet. 12)

identified potential entrants remaining after the merger, the companies in the market would feel less constrained than before.

The Court of Appeals below failed (in the Government's view properly) to undertake that inquiry. Indeed, of the eight individuals who participated in the decisions below, only one—Commissioner Elman—really considered the question, and his conclusion was clear. Having in mind the character of the potential competitors remaining on the scene after the merger ("with their vast resources and marketing power" Pet. App. B., p. 258a), he said:

> "Whatever potential competition was eliminated is of paltry significance compared to what remains: and there is every indication that potential competition will increase, rather than decrease, in the future. To the extent that the possibility of new entry acts as a restraining influence on sellers in an oligopolistic or concentrated market, inclining them to maintain prices at a level low enough to discourage entry (see *Clorox*, pp. 27-28, 61-62), the acquisition here cannot be regarded as affecting potential competition in any way that could reasonably be expected to influence the behavior of S.O.S., Brillo, and the other firms in the steel wool business. . . ." (Pet. App. B, pp. 255a-256a)

In its brief the Government attempts a factual attack upon Commissioner Elman's conclusion (Br. 13-14),[6]

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[6] In fact the attack itself is based on a misreading of the record. The Government asserts in effect that there is no evidence that any of the large identified potential competitors had any interest in the steel wool soap pad market (Br. 13-14)—whereas the cited portions of the record show that Colgate-Palmolive is actively engaged in the steel wool soap pad business, that Lever Bros., American Home Products, and Procter & Gamble have shown an interest in the development of steel wool soap pads, and that Union Carbide, the du Pont Company, General Mills, General Cable and

but, whatever the merits of the factual argument, it cannot excuse the Court of Appeals' refusal to consider the character and strength of the identified potential entrants whose influence would continue to be felt in the future. Where there has been no consideration of such factors, there is no basis for concluding that there has been a reduction in the restraints upon the exercise of oligopoly power within the market and hence a lessening of competition within the meaning of Section 7.

3. The third issue raised by petitioner is whether the achievement of genuine economic efficiencies as a result of a conglomerate merger can properly be treated as an affirmative basis for condemning the merger. The striking feature of the Government's position with respect to this question is that at no point does it disagree with petitioner as to the correct answer to the question as a matter of law. It is evident that in this Court (though not before the Commission or the Court of Appeals) the Government concedes that real efficiencies are not a proper basis for condemning such a merger.

Having confessed as much, however, the Government attempts to avoid the consequences here by asserting that in this case the achievement of economies in transportation and distribution "was not the basis of the Commission's decision." (Br. 15) The issue between the parties now, therefore, is not the importance of the efficiencies question or what its proper resolution should be; the issue is what was said in the opinions below.

Minnesota Mining are all either interested or actively engaged in marketing closely related products. *Cf.* FTC v. Procter & Gamble Co., 386 U.S. 568, 573, 580 (1967).

Obviously that dispute can be readily resolved simply by reading the opinions and briefs. Counsel supporting the complaint before the Commission vigorously argued that GF's acquisition of S.O.S. had allowed the resulting company to achieve economies of scale in transportation and distribution—and the Commission majority's opinion repeatedly refers to such economies as affirmative reasons for condemning the merger. These factors, together with resulting reductions in operating costs and prices to retailers, are described in great detail in the lengthy appendix to the Commission's decision, and on this basis Commissioner Elman correctly observed that "[t]he Commission also includes, as a ground for holding this merger unlawful, purported cost savings accruing to S.O.S. through efficiencies in warehousing and distribution." (Pet. App. B, p. 261a) Thereafter, at the explicit request of Commission counsel, the Court of Appeals below rejected Commissioner Elman's and petitioner's objections to the majority's position and expressly mentioned the controversial cost savings as a ground for sustaining the Commission majority's decision. (Pet. App. A, p. 19) In the opinions below there is thus a clear condemnation of economies of scale, and the Government is simply wrong in suggesting the contrary.[7]

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[7] The Government also attempts to minimize the significance of these efficiencies by asserting that they "are *not* production or distribution efficiencies that would be available to any firm ... . but advantages available to a particular competitor only because of its sheer market power." (Br. 16 n. 3) It attempts to support this proposition by focusing entirely upon advertising and promotional cost savings. But the efficiencies involved in *this* case include actual distribution efficiencies such as "a market center distribution system," "warehousing by the most efficient time and labor-saving devices," and "distribution by the most advantageous rate of transportation," enabling a retailer to "run his business more economically by holding his investment and inventory to a minimum." (*See* Pet. 14-15)

Going to really rather remarkable lengths to avoid these difficulties, the Government then observes that operating efficiencies "cannot justify an otherwise unlawful merger," thus creating the impression that such economic efficiencies were brought into the case by petitioner by way of defense, rather than by Commission counsel as a ground of illegality. (Br. 16) This is untrue. Such efficiencies were brought into the case by counsel supporting the complaint. They affirmatively sought to prove the existence of cost savings in transportation and distribution and leaned heavily on such evidence before both the Commission and the Court of Appeals. And in this effort, as noted, they were successful. At no time has petitioner ever relied on such evidence as a defense.

Apart from the foregoing attempts to avoid the issue raised in the petition, the Government advances the extraordinary suggestion that, even if the Commission below relied upon invalid grounds for condemning this merger, this Court should not consider such invalid grounds because the Commission also took into account grounds which the Government considers valid. The theory rests upon two propositions: (a) that the economics of this case and *Clorox* are substantially identical (an approach which Commissioner Elman described as the "carbon copy" approach (Pet. App. B, p. 251a)) and (b) that, since the foregoing conclusion must be regarded as unassailable, it is immaterial that the Commission also relied upon economic efficiencies—a ground which the Government characterizes as being not "essential to its holding of illegality." (Br. 16) But this line of argument is totally unacceptable.

In the first place, the initial proposition begs the question. With respect to each of the three issues presented here, petitioner asserts that the tribunals below misinterpreted, and acted inconsistently with, the

teachings of *Clorox*. We claim, as Commissioner Elman put it below, that this case is not a "mere replica" of *Clorox* (Pet. App. B, p. 249a) and that the Commission here has moved significantly "beyond the existing boundaries of the merger law." (*Ibid.*)[8] Hence the Government's assertion that, on the "carbon copy" ground alone, the Commission "was justified in condemning the present merger" (Br. 15-16) is hardly an argument that the case is not sufficiently important to be considered by this Court.

Secondly, and for present purposes more significantly, it is hornbook law that an administrative decision reached in reliance upon improper considerations cannot stand, regardless of any speculation about what that decision might have been in the absence of those considerations. *E.g., St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 75 (1936). Since the Government in effect here concedes the impropriety of reliance upon genuine economies to invalidate a merger, and since the point is of great significance in the administration of the antitrust laws, certiorari should be granted.

CONCLUSION

Petitioner contends that the tribunals below reached their conclusion by refusing to consider legally relevant factors, and by taking into consideration, and relying upon, legally irrelevant matters. The legal rules thus put in issue in this case are of great importance to the antitrust laws, and the Government's

[8] Since the significant economic differences between this case and *Clorox* have been noted by Commissioner Elman (Pet. App. B., pp. 252a-55a), by the Court of Appeals (Pet. App. A, pp. 20-21), and in the petition (Pet. 4-5), they need not be repeated here.

difficulty in dealing with them confirms petitioner's conclusion that the petition for certiorari should be granted.

Respectfully submitted,

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